Ely's "Theory of Judicial Review"

RAOUL BERGER

Aware that activist judicial review is inconsistent with democratic theory because it substitutes the policy choices of unelected, unaccountable judges for those of the people's representatives, Professor John Hart Ely propounds a more restricted theory in terms of insuring access to the political process.[1] On first blush it seems a mere rehash of the *Carolene Products* footnote.[2] But where Justice Stone spun his footnote out of thin air, Ely would root it in the Constitution.[3] Roughly speaking, Stone was concerned with legislation restricting "political processes which can ordinarily be expected to bring about repeal of undesirable legislation" or reflecting "prejudice against discrete and insular minorities" tending to "curtail the operation of those political processes."[4] Already others are questioning Ely's analysis on jurisprudential and empirical grounds;[5] I shall examine his uses of history.

He states his theory succinctly: "[U]nblocking stoppages in the democratic process is what judicial review ought preeminently to be about, and denial of the vote seems the quintessential stoppage."[6] Justice Harlan truly affirmed, however, that the Warren Court's "one person-one vote" interpretation was "made in the face of irrefutable and still unanswered history to the contrary"[7]—the framers' unmistakable exclusion of suffrage from the four-

---

1. J. ELY, DEMOCRACY AND DISTRUST 5, 8, 45 (1980) [hereinafter cited as ELY]. Ely has performed a service in laying bare that the activist view, that in enforcing the Constitution the judge should use his "*own values* . . . , is a methodology that is seldom endorsed in so many words." *Id.* at 44 (emphasis in original). He considers an "appeal to some notions" not "found . . . in the Constitution . . . especially vulnerable to a charge of inconsistency with democratic theory." *Id.* at 5. The "transparent failure of the dominant mode of 'non-interpretivist'" review leads Ely to come forward with his theory. *Id.* at 41. Ely candidly comments that "democratic decision quite consistently generates value choices with which many of us, myself included, rather fervently disagree." *Id.* at 248.

2. United States v. Carolene Products Co., 304 U.S. 144, 152–53 n.4 (1938). *See* Tushnet, *Darkness at the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1045–46 (1980) ("According to Ely, the footnote . . . 'has not been adequately elaborated.' Unfortunately, he contributes little that is new.") *See also* Taylor, *Due Process Under Review*, N.Y. Times, March 16, 1980, § 7 (Book Review), at 11.

3. For the genesis of the footnote, *see* R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 275–78 (1977). Professor George Braden wrote that the footnote "is simply part of one man's set of values," which he is "willing to enforce when the opportunity arises." Braden, *The Search for Objectivity in Constitutional Law*, 57 YALE L.J. 571, 581 (1948).

Ely has written that if a "neutral and durable principle . . . lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it." Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 949 (1973).

4. 304 U.S. 144, 152–53 n.4 (1938).

5. Tushnet considers that Ely's "critique of the prevailing theories can be turned, point for point, against his own theory; in particular, representation-reinforcing review necessarily invokes judicial displacement of citizens' choices between political and other kinds of activity, in the name of the objective value of political participation." Tushnet, *Darkness at the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1040 (1980). *See* text accompanying notes 330–32 *infra*. *See also* Leedes, *The Supreme Court Mess*, 57 TEX. L. REV. 1361, 1422–37 (1979).

6. ELY, *supra* note 1, at 117.

7. Griswold v. Connecticut, 381 U.S. 479, 501 (1965).

teenth amendment—a fact increasingly acknowledged by activist commentators.[8] When I read Ely's devastating attack on the activist tenet that judges are oracles of moral values, diviners of social consensus,[9] his assertion that "our society did not . . . move to near-universal suffrage . . . [to] have superimposed on popular decision the values of first-rate lawyers"[10]—a conclusion that I share—I wondered why he should label views expressed in my confirmatory study of Harlan's evidence as "incredible," "bordering on perversity."[11] Now I understand; the framers' exclusion of suffrage from the fourteenth amendment constitutes an insurmountable barrier to interference with state "political processes." In his efforts to tear down this barrier, Ely twists, bends, and distorts the historical facts to fit his theory. And he compounds the offense by ignoring my documented refutation of his earlier published opening chapters.[12] A scholar who would appraise the historical record must take account of discrepant evidence and opposing inferences;[13] Ely fails dismally on both counts. Throughout, he prefers speculation to fact, a favorable utterance to preponderant evidence to the contrary, as I shall again document in detail. That task is the more essential because his book has been hailed by respected academicians as "the single most important contribution to the American theory of judicial review written in this century," as a "dazzling intellectual performance, . . . a rare achievement."[14] With so influential an imprimatur, Ely's faulty history may become "incorporated into that collection of fixed beliefs and settled opinion that governs the conduct of affairs."[15]

---

8. Lusky, *Book Review*, 6 HASTINGS CONST. L.Q. 403, 406 (1979), refers to "Justice Harlan's irrefutable and unrefuted demonstration in dissent that the Fourteenth Amendment was not intended to protect the right to vote." *See also* Alfange, *On Judicial Policymaking and Constitutional Change: Another Look at the "Original Intent" Theory of Constitutional Interpretation*, 5 HASTINGS CONST. L.Q. 603, 622 (1978); Abraham, *Book Review*, 6 HASTINGS CONST. L.Q. 467, 468 (1979); Mendelson, *Book Review*, 6 HASTINGS CONST. L.Q. 437, 452–53 (1979); Nathanson, *Book Review*, 56 TEX. L. REV. 579, 581 (1978); Perry, *Book Review*, 78 COLUM. L. REV. 685, 687 (1978).

Paul Brest remarks that "the adopters of the equal protection clause probably intended it not to encompass voting discrimination at all." Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 234 n.115 (1980). Even Ely concedes that "it does seem probable that most of the framers (and ratifiers) of the Fourteenth Amendment did not specifically anticipate that its first section would be applied to voting rights," but contends that Harlan's "specific intentions of the framers" should yield to the "overriding intention . . . to state a general ideal" of equality, ELY, *supra* note 1, at 118–19, which he conjures out of the blue. It is elementary that the general must give way to the specific.

9. Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 16, 49, 51 (1978). *See* ELY, *supra* note 1, at 67, 102, 219 n.112.

10. Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 38 (1978).

11. Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 434 n.129, 436 n.133 (1978). *See also* ELY, *supra* note 1, at 200 n.70.

Should the reader consider my own strictures too severe, consider that Ely labels as "gibberish" and "nonsense," ELY, *supra* note 1, at 32, 140, 121, some reasoning of his "carefully chosen hero," Chief Justice Warren, *id.* at dedication, states that the Court "made itself look quite silly," *id.* at 19, charges Justice Field with "schizophrenia," *id.* at 24, adverts to the Court's "infatuation" with a faulty analysis, *id.* at 106, and labels the results of certain decisions a "disaster," *id.* at 19, betraying a "transparent lack of principle," *id.* at 109.

12. Berger, *Government by Judiciary: John Hart Ely's "Invitation,"* 54 IND. L.J. 277 (1979).

13. SIR H. BUTTERFIELD, GEORGE III AND THE HISTORIANS 225 (1969).

14. Professors Henry P. Monaghan and Gerald Gunther, respectively. *See* ELY, *supra* note 1, dust jacket. *But compare* Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots and Prospects*, 1979 WASH. U.L.Q. 817, 825 *quoted in* note 71 *infra*.

15. Wiggins, *Lawyers as Judges of History*, 75 MASS. HIST. SOC. PROC. 84, 104 (1963).

Ely's unreliable historicism is speedily illustrated by his treatment of the fifteenth amendment, ignoring my demonstration that it is incompatible with historical fact. Seizing on my statement that "the key to an understanding of the Fourteenth Amendment is that the North was shot through with Negrophobia, that the Republicans, except for a minority of extremists, were swayed by the racism that gripped their constituents,"[16] Ely challenges the implication that in consequence the framers

> could not conceivably have intended to draft a provision capable one day of supporting the inference that blacks were entitled to vote. . . . Curiously lacking is any attempt whatever to account for the fact that the Fifteenth Amendment, explicitly granting blacks the vote, was proposed and ratified only *two years later*. . . . Of course this suggests that the framers didn't think Section 1 of the Fourteenth Amendment had had that effect. . . . It is extremely damaging, however, . . . to Berger's general claim of the dominance of "Negrophobia."[17]

Ely concedes that "racism of the sort that supported separate schools was into the 1950s (and remains today) a strong strain in American life," that "recognition that there was racism in society doubtless was one reason the framers chose open-ended language capable of development over time,"[18] that is, they did not dare reveal a purpose to thwart popular sentiment. Consequently, it is Ely who is perverse in reiterating that "the claim that race prejudice is 'the key' to interpreting the Fourteenth Amendment is one that borders on perversity."[19]

If the framers "didn't think" that the fourteenth amendment granted black suffrage—the central issue—whether or not Negrophobia was dominant is beside the point. Numerous statements by the framers attest that the fifteenth amendment was necessary because suffrage was excluded from the fourteenth,[20] as Ely confirms in acknowledging that the fifteenth amendment "opens the [voting] process to persons who had previously been excluded."[21] Nevertheless he reasons that "the ratification of the Fifteenth Amendment so soon after the Fourteenth is one reason . . . that the lack of any specific expectation that the earlier provision would apply to voting should not mean it

---

16. ELY, *supra* note 1, at 200 n.70, *quoting* R. BERGER, GOVERNMENT BY JUDICIARY 10 (1977).

17. ELY, *supra* note 1, at 200 n.70 (emphasis in original).

18. *Id.* at 66, 1, 201 n.70.

19. *Id.* at 201 n.70.

20. For citations, *see* Berger, *The Fourteenth Amendment: Light From the Fifteenth*, 74 NW. U.L. REV. 311, 321–23 (1979). To quote only Senator Jacob Howard, the proposed fifteenth amendment "is the only attempt which has been made since the foundation of the Government to interfere with this right of the States to prescribe the qualifications of voters." CONG. GLOBE, 40th Cong., 3d Sess. 985 (1869).

21. ELY, *supra* note 1, at 98. Ely notes that five of our last ten constitutional amendments "have extended the franchise . . . to persons who have previously been denied it." *Id.* at 7, 99. These extensions, he argues, reflect a "strengthening constitutional commitment to the proposition that all qualified citizens are to play a role in the making of public decisions," *id.* at 123, "the achievement of a political process open to all on an equal basis," *id.* at 99. But as Professor Robert Bork observes, "[t]hat expansion was accomplished politically, and the existence of a political trend cannot by itself give the Court warrant to carry the trend beyond its own limits. How far the people decide not to go is as important as how far they do go." Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695, 698. In contrast, Ely urges: "We cannot trust the ins to decide who stays out, and it is therefore incumbent on the courts to ensure . . . that no one is denied the vote for no reason . . . ." ELY, *supra* note 1, at 120.

shouldn't be interpreted to do so."[22] There was more than "lack of any specific expectation"; there was an unmistakable intention to *exclude* suffrage from the scope of the fourteenth. Thus Ely would read into the fourteenth what had been excluded and therefore, according to the testimony of the fifteenth's framers, required a fresh amendment, an extraordinary interpretation deriving from his need to ground his "political access" theory on the fourteenth amendment, for the fifteenth applies to blacks alone. He himself rejects as "gibberish both syntactically and historically" Chief Justice Warren's reading of the fourteenth's equal protection back into the fifth.[23] To read the fifteenth back into the fourteenth is no less "gibberish."

Since Ely's "borders on perversity" poses the issue of scholarly trustworthiness, a few more facts are in order. In 1866 George Julian, an Indiana Radical, lamented in the House that "the real trouble is that we hate the negro,"[24] an "almost ineradicable prejudice" noted by others.[25] "[N]o man can doubt," said Senator John Sherman, that "there was a strong and powerful prejudice . . . among all classes of citizens against extending the right of suffrage to negroes."[26] The 1865–1868 rejection of suffrage by seventeen states[27] explains Senator Jacob Howard's statement that "three-fourths of the States of this Union could not be induced to vote to grant the right of suffrage."[28] During the pendency of the fifteenth amendment, Senator Henry Wilson, a Massachusetts Radical, stated: "There is not today a square mile in the United States where the advocacy of the equal rights and privileges of those colored men has not been in the past and is not now unpopular."[29] To argue that "recognizing racism in one's constituents and being racist oneself are not equivalent"[30] is grasping at straws. Members of Congress "did not intend to risk drowning by swimming against the treacherous current of racial prejudice and opposition to Negro suffrage."[31] A Reconstruction historian, Morton Keller, observes that "most congressional Republicans were aware of (and shared) their constituents' hostility to black suffrage."[32] Abatement, let

22. ELY, *supra* note 1, at 236 n.37. Ely reiterates: "The lack of any specific expectation that the Fourteenth Amendment would be applied to voting seems unusually irrelevant in light of the ratification of the Fifteenth Amendment two years later," which "was supported by essentially the same people as the Fourteenth." *Id.* at 119–20.

23. *Id.* at 32.

24. CONG. GLOBE, 39th Cong., 1st Sess. 257 (1866) (emphasis omitted).

25. Citations are collected in R. BERGER, GOVERNMENT BY JUDICIARY 13 (1977).

26. CONG. GLOBE, 39th Cong., 1st Sess., App. 131 n.24 (1866).

27. Oregon v. Mitchell, 400 U.S. 112, 256 (1970) (Brennan, J., dissenting in part).

28. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

29. CONG. GLOBE, 40th Cong., 3d Sess. 672 (1869). "Neither the anti-slavery controversy, nor the Civil War, nor the inconclusive political maneuvering of Reconstruction made any basic changes in the prevailing attitudes toward race . . . , attributes clearly reflected in the congressional politics of Reconstruction." Nye, *Comment on C.V. Woodward's Paper*, in NEW FRONTIERS OF THE AMERICAN RECONSTRUCTION 148, 156 (H. Hyman ed. 1966). But for Nye, the citations from notes 24–29 hereof were called to Ely's attention in Berger, *Government by Judiciary: John Hart Ely's "Invitation,"* 54 IND. L.J. 277, 286, 307 (1979).

30. ELY, *supra*. note 1, at 201 n.70.

31. W. GILLETTE, THE RIGHT TO VOTE 25 (1965).

32. M. KELLER, AFFAIRS OF STATE 67 (1977). *See also* Nye, *Comment on C. V. Woodward's Paper*, in NEW FRONTIERS OF THE AMERICAN RECONSTRUCTION 148 (H. Hyman ed. 1966).

Senator John Sherman said in the Senate: "[W]e do not like negroes. We do not conceal our dislike." Woodward, *Seeds of Failure in Radical Race Policy*, in NEW FRONTIERS OF THE AMERICAN RECONSTRUC-

alone absence, of racial prejudice does not therefore serve to explain the adoption of the fifteenth amendment. Instead it was a response to political exigencies.

Throughout, the leading object of the Republicans was to prevent the return to power of the slavocracy, because the combination of Southern and Northern Democrats could control Congress and elect a President.[33] The primary goal of the fifteenth amendment, Professor William Gillette concluded, was enfranchisement of Negroes "outside the deep South" in order to obtain the necessary swing vote of blacks in the North. A secondary objective, he wrote, "was to protect the southern Negro against future disfranchisement," for it had become apparent that military occupation must come to an end and continued control must rest on Negro voters,[34] again aimed to perpetuate Republican ascendancy. My own recent study of the history of the fifteenth amendment confirms that the drive for its adoption was political in origin.[35] Thaddeus Stevens, the leader of the Radicals, began drafting the amendment "to save the Republican party from defeat . . . ."[36] Senator Oliver Morton, who had opposed Negro suffrage, now embraced it "as a political necessity."[37] The motivation, in short, was "largely political, not humanitarian, in origin."[38] In reiterating his charge that my analysis founders on the fifteenth amendment without taking account of my demonstration that his inferences are contrary to historical fact,[39] Ely betrays a determination to maintain an erroneous theory at all costs.

Because the framers' unmistakable exclusion of suffrage from the fourteenth amendment is "fatal"[40] to Ely's attempt to root judicial control of "political processes" in the Constitution, it will be useful to recapitulate a few facts against which to measure his attempts to explain them away. Justice Brennan observed that "17 or 19" Northern States had rejected black suffrage between 1865 and 1868.[41] Consequently, Roscoe Conkling, a member of the Joint Committee on Reconstruction of both Houses, which drafted the amendment, stated that it would be "futile to ask three quarters of the States

---

TION 128 (H. Hyman ed. 1966). In an article published in THE NATION, August 2, 1866, Thomas G. Shearman wrote: "The members from Indiana and Southern Illinois well knew that their constituents had barely overcome their prejudices sufficiently to tolerate even the residence of negroes among them, and that any greater liberality would be highly repulsive to them." *Quoted in* 6 C. FAIRMAN, HISTORY OF THE SUPREME COURT 1283 n.246 (1971).

Against these and many other similar statements, Ely's reference to "racially prejudiced thinking of a sort we understand the Fourteenth Amendment to have been centrally concerned with eradicating," ELY, *supra* note 1, at 243 n.11, substitutes wishful thinking for historical fact.

33. R. BERGER, GOVERNMENT BY JUDICIARY 15–16 (1977).

34. W. GILLETTE, THE RIGHT TO VOTE 46–47, 49–50 (1965). For additional citations, *see* Berger, *The Fourteenth Amendment: Light From the Fifteenth*, 74 NW. U.L. REV. 311, 317 n.34 (1979).

35. Berger, *The Fourteenth Amendment: Light From the Fifteenth*, 74 NW. U.L. REV. 311 (1979).

36. W. GILLETTE, THE RIGHT TO VOTE 34 (1965).

37. *Id.* at 57.

38. *Id.* at 146.

39. ELY, *supra* note 1, at 201 n.70; Berger, *Government by Judiciary: John Hart Ely's "Invitation,"* 54 IND. L.J. 277, 307–08 (1979).

40. I borrow "fatal" from ELY, *supra* note 1, at 119, 198 n.64.

41. *See* note 27 and accompanying text *supra*.

to do . . . the very thing which most of them have already refused to do . . . ."[42] Another member of the Committee, Senator Howard, spoke to the same effect.[43] Senator William Fessenden, Chairman of the Joint Committee, said of a suffrage proposal that there is not "the slightest probability that it will be adopted by the States . . . ."[44] The unanimous Report of the Joint Committee doubted that "the States would consent to surrender a power they had exercised, and to which they were attached," and therefore thought it best to "leave the whole question with the people of each State."[45] That such was the vastly preponderant opinion is confirmed by a remarkable fact: during the pendency of ratification, radical opposition to readmission of Tennessee because its constitution excluded Negro suffrage was voted down in the House by 125 to 12; and Senator Charles Sumner's parallel proposal was rejected by thirty-four to four,[46] indicating that even the radicals did not believe that suffrage was covered by the fourteenth amendment. A bevy of activists concur that suffrage was excluded, as was segregation.[47] To insist against such facts the "legislative history is in unusual disarray," that there exists no "reliable picture" of the ratifiers' intentions,[48] is to bury one's head in the sand. The Supreme Court has held that "[t]he opinions of some members of the Senate, conflicting with the explicit statements of the meaning of the statutory language made by the Committee reports and members of the committees on the floor . . . , are not to be taken as persuasive of the Congressional purpose."[49] And it is downright misleading to read this history as "it does seem probable that most of the framers (and ratifiers) of the Fourteenth Amendment did not specifically anticipate that its first section would be applied to voting rights,"[50] in the face of repeated assurances that suffrage was excluded.

---

42. CONG. GLOBE, 39th Cong., 1st Sess. 358 (1866).

43. *See* text accompanying note 28 *supra*.

44. CONG. GLOBE, 39th Cong., 1st Sess. 704 (1866). For additional citations, *see* R. BERGER, GOVERNMENT BY JUDICIARY 58–60 (1977).

45. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, 39th Cong., 1st Sess. xiii (1866), *quoted more fully* in R. BERGER, GOVERNMENT BY JUDICIARY 84 (1977).

46. For details, *see* R. BERGER, GOVERNMENT BY JUDICIARY 56, 59–60, 79 (1977).

47. *See* note 8 *supra* and note 67 *infra*. Such is the evidence, corroborated by many other statements, marshalled by Justice Harlan, and confirmed by R. BERGER, GOVERNMENT BY JUDICIARY 52–68 (1977), about which Ely asserts that Harlan's "evidence [is reduced] to certain statements that § 1 was not intended to cover voting, but such statements are few and far between." ELY, *supra* note 1, at 235 n.36. His reference to "few" statements that section 2 indicated that section 1 excluded suffrage is discussed in text accompanying notes 58–62 *infra*. Presumably Ely would reject effectuation of the framers' determination as "historically straitjacketed literalism," as referring "society's substantive value choices . . . to the beliefs of people who have been dead for over a century." ELY, *supra* note 1, at 2. *See also id.* at vii.

48. ELY, *supra* note 1, at 16, 17. *See also id.* at 119. Ely twits those who believe "'contraception yes—voting no,'" *id.* at 117, but one may ask him, a caustic critic of the contraception decision, why "contraception no—voting yes?" Justice Harlan considered the reapportionment cases as a "'much more audacious and far-reaching judicial interference with the state legislative process . . . than the comparatively innocuous use of judicial power in the contraceptive case.'" So Professor Paul Kauper paraphrased the Harlan view. R. BERGER, GOVERNMENT BY JUDICIARY 392 (1977).

49. United States v. Wrightwood Dairy Co., 315 U.S. 110, 125 (1942). *See also* Union Starch & Ref. Co. v. NLRB, 186 F.2d 1008, 1012 (7th Cir. 1951).

50. ELY, *supra* note 1, at 118.

Although Ely notes that the *ratifiers* did not anticipate that section 1 applied to suffrage—the popular hostility to suffrage required minimally that they be advised that it did apply—Ely quotes Thomas Cooley to the effect that the people are not supposed to "have looked for any dark or abstruse meaning in the words employed," a lesson that Berger allegedly has yet to learn.[51] There was no occasion to search for a "dark or abstruse meaning" or for the intention of the ratifiers, for the evidence is that on the suffrage issue framers and people were as one. Senator Sherman, it will be recalled, referred to "the strong and powerful prejudices . . . among all classes of citizens against extending the right of suffrage to Negroes."[52] Philip Paludan considers that the fourteenth amendment "was presented to the people as leaving control over suffrage in state hands, as representing no change in previous constitutional conditions."[53] The Joint Committee Report which so stated was widely distributed.[54] William Gillette wrote that "white Americans resented and resisted" Negro suffrage, and that "Negro voting in the North was out of the question,"[55] as rejection of Negro suffrage by seventeen to nineteen states should amply prove.

In the face of these facts, it would be a "dark and abstruse meaning" to read the very suffrage rejected by the people into the amendment. To the contrary, the facts raise a presumption that the framers spoke for the people and were endorsed by the ratifiers.[56] Let Ely show that the sentiments of the ratifiers were contrary to those of their representatives in Congress, the framers. Instead he altogether ignores their unanimity.

To discredit Justice Harlan's conclusion that the equal protection clause "simply had not been intended by its framers to apply to voting," Ely cites Harlan's quotation of Bingham's statement:

---

51. *Id.* at 18, 191 n.25.

52. *See* text accompanying note 26 *supra*. *See also* text accompanying notes 31–32 *supra*.

53. P. PALUDAN, A COVENANT WITH DEATH 52 (1975).

54. A. AVINS, THE RECONSTRUCTION AMENDMENT DEBATES vi (1967).

55. W. GILLETTE, THE RIGHT TO VOTE 27, 32 (1965). *See also* text accompanying note 42 *supra*. Another member of the Joint Committee, Senator George W. Williams of Oregon, stated:

> "[T]he people of these United States are not prepared to surrender to Congress the absolute right to determine as to the qualifications of voters in the respective States, or to adopt the proposition that all persons, without distinction of race or color, shall enjoy political rights and privileges equal to those now possessed by the white people of the country. Sir, some of the States have lately spoken upon that subject. Wisconsin and Connecticut, northern, loyal and republican States, have recently declared that they would not allow the negroes within their own borders political rights; and is it probable that of the thirty-six States more than six, at the most, would at this time adopt the constitutional amendment proposed by the gentleman? . . . Put it before the country and commit the Union party to it, the amendment will be defeated and the Union party overwhelmed in its support—and the control of the government would pass into the hands of men who have more or less sympathized with the rebellion; and I say that it is of more consequence, in my judgment, that the control of the Government should remain in the hands of the men who stood up for the Union during the late war than that any constitutional amendment should be adopted by which the right of suffrage should be extended to any person or persons not now enjoying it." CONG. GLOBE, 39th Cong., 1st Sess., S. App. 95 (1866).

56. Dellinger, *School Segregation and Professor Avin's History: A Defense of* Brown v. Board of Education, 38 MISS. L.J. 248, 250 n.6 (at 251) (1967).

> *The second section excludes the conclusion that by the first section suffrage is subjected to congressional law;* save, indeed, with this exception, that as the right of the people in each State to a republican government and to choose their Representative in Congress is [one] of the guarantees of the Constitution, by this amendment a remedy might be given directly for a case supposed by Madison, where treason might change a State government from a republican to a despotic government, and thereby deny suffrage to the people.[57]

The second clause, Ely maintains, is "fatal" to Harlan's claim that "§ 1 of the Fourteenth Amendment just doesn't apply to voting."[58] For the moment, let us defer the republican form issue and note that Bingham's italicized clause expressed the general sentiment. So, Senator Howard stated: "The second section leaves the right to regulate the elective franchise still with the States, and does not meddle with that right."[59] In the House, James Blaine stated: "The effect contemplated . . . is perfectly well understood, and on all hands frankly avowed. It is to deprive the lately rebellious States of the unfair advantage of a large representation in this House, based on their colored population, so long as that population shall be denied political rights. . . . Give them the vote or lose representation,"[60] as section 2 provides. There were many such utterances;[61] and the framers of the fifteenth amendment, who included many framers of the fourteenth, repeatedly noted that section 2 testified to the exclusion of suffrage from the fourteenth.[62] Here as elsewhere, Ely prefers a tortured reading of one utterance to many unequivocal voices to the contrary.

The unreliability of his historical pronouncements is again exemplified by his remark: "It plainly shouldn't have required a constitutional amendment to extend the vote to women, and today it wouldn't, but in 1920 the Equal Protection Clause had scarcely been discovered, let alone applied to vot-

---

57. ELY, *supra* note 1, at 118–19, *citing* Reynolds v. Sims, 377 U.S. 533, 598–99 (1964)(Harlan, J., dissenting)(emphasis by Harlan, J.).

58. *Id.* at 119. Ely states: "That essentially reduces Harlan's evidence to certain statements that § 1 was not intended to cover voting, but such statements are few and far between, a fact that seems devastating in light of the facial breadth of the provision." *Id.* at 235 n.36. Thus does Ely brush aside the Committee Report, the statements by committee members and its chairman, to which the Court gives decisive effect. *See* text accompanying notes 41–48 *supra*. The evidence is collected in R. BERGER, GOVERNMENT BY JUDICIARY 52–68 (1977). Consider Ely's doubts in light of James Garfield's statement about the amendment: "I profoundly regret that we have not been enabled to write it [suffrage] and engrave it upon our institutions, and imbed it in the imperishable bulwarks of the Constitution as a part of the fundamental law of the land," but was willing "when I cannot get all I wish to take what I can get." CONG. GLOBE, 39th Cong., 1st Sess. 2462 (1866).

59. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866). Howard stated on behalf of the Joint Committee, "It was our opinion that three fourths of the States . . . could not be induced to vote to grant the right of suffrage, even in any degree or under any restriction, to the colored race." *Id. See also* note 20 *supra*.

60. CONG. GLOBE, 39th Cong., 1st Sess. 141 (1866).

61. R. BERGER, GOVERNMENT BY JUDICIARY 64–68 (1977).

62. For numerous citations, *see* Berger, *The Fourteenth Amendment: Light From the Fifteenth*, 74 NW. U.L. REV. 311, 319, 321 (1979). Asserting that "the legislative history is not as clear as Harlan claimed it was," Ely cites an article by Professor William Van Alstyne and an opinion by Justice Brennan in reliance on that article, ELY, *supra* note 1, at 119, 235 n.36, ignoring my detailed refutation of Van Alstyne in 42 pages and of Brennan in 8 more. Such omissions are the more serious in view of current activist acceptance of Harlan's proof. *See* note 8 *supra*.

ing."[63] The discovery was like Justice Field's earlier discovery of the uses of economic due process, for as Professor Herbert Packer observed, "the new 'substantive equal protection' has under a different label permitted today's justices to impose their prejudices in much the same manner as the Four Horsemen once did."[64] Sweet are the uses of "discovery." If women's suffrage "required" no constitutional amendment, it must be because it was comprehended by the fourteenth amendment. Plainly, however, it was excluded by the framers. A proposal to extend suffrage to women in the District of Columbia, said Senator Lot Morrill, "would contravene all our notions of the family";[65] it was rejected by Senator Henry Wilson and others.[66] Even the apostle of Negro suffrage, Senator Sumner, voted against the inclusion of women, leaving it to be dealt with in "the future."[67] A unanimous Report of the Senate Judiciary Committee in 1872 rejected the claim of Elizabeth Cady Stanton and other feminists that they were entitled to vote by virtue of the fourteenth amendment, stressing that the fifteenth "would have been wholly unnecessary if the fourteenth had secured to all citizens the right to vote,"[68] as the Supreme Court reiterated in *Minor v. Haperstett*.[69] It is no answer to point to the Warren Court's application of the equal protection clause to voting,[70] for the legitimacy of that action is the very point in issue: may the

63. ELY, *supra* note 1, at 237 n.43. As late as 1927, Justice Holmes stated that the claim that state legislation violates the equal protection clause is "the usual last resort of constitutional arguments." Buck v. Bell, 274 U.S. 200, 208 (1927).

64. Packer, *The Aim of the Criminal Law Revisited: A Plea for a New Look at "Substantive Due Process,"* 44 S. CAL. L. REV. 490, 491–92 (1971).

65. A. AVINS, THE RECONSTRUCTION AMENDMENT DEBATES 250 (1967). *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872)(Bradley, J., concurring), *quoted in* ELY, *supra* note 1, at 51.

66. A. AVINS, THE RECONSTRUCTION AMENDMENT DEBATES 251 (1967). *See also id.* for statements made by Senators Williams and Yates.

67. *Id.* at 255. Professor Charles Fairman notes that women urged Congress to include them, "the only remaining class of disfranchised citizens," but that "[t]o the abolitionists women suffrage was extra luggage they were not willing to bear." 6 C. FAIRMAN, HISTORY OF THE SUPREME COURT 1263–64 (1971).

68. A. AVINS, THE RECONSTRUCTION AMENDMENT DEBATES 572 (1967).

69. 88 U.S. (21 Wall.) 162, 175 (1874).

70. ELY, *supra* note 1, at 117–19. Of the same order is Ely's appeal to Chief Justice Warren's statement in the desegregation case that the legislative history relating specifically to schooling was "'inconclusive.'" *Id.* at 119. This was merely a dodge to escape the impact of the history. Professor Philip Kurland wrote that in "*Brown* the Court abandoned the search for the framers' intent . . . and chose instead to write a Constitution for our times." Kurland, Brown v. Board of Education *Was the Beginning*, 1979 WASH. U. L.Q. 309, 313.

One need only recall James Wilson's assurance to the framers that the Civil Rights Act did not comprehend mixed schools, CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866), that repeated attempts to procure desegregated schools in the District of Columbia failed, R. BERGER, GOVERNMENT BY JUDICIARY 123–24 (1977), that Senator Sumner, the unflagging champion of desegregated schools, proposed during the course of the debates on the fifteenth amendment to add a phrase outlawing "discrimination in rights on account of race, . . ." correctly insisting that "if the clause [fourteenth] is inadequate to protect persons in their . . .right to vote, it is inadequate to protect them in anything,"CONG. GLOBE, 40th Cong., 3d Sess. 1008 (1869). He failed. For documentation, *see* R. BERGER, GOVERNMENT BY JUDICIARY 117–33 (1977). Activist Professor Nathaniel Nathanson wrote that Bickel "quite conclusively demonstrated" the framers' intention that the fourteenth amendment would not require desegregation, and that "Berger's independent research and analysis confirms and adds weight to these conclusions." *See* Nathanson, *Book Review*, 56 TEX. L. REV. 579, 581 (1978). Professor Henry J. Abraham considers that the framers of the amendment "specifically rejected its application to segregated schools." Abraham, *Book Review*, 6 HASTINGS CONST. L.Q. 467, 467 (1979). *See also* Perry, *Book Review*, 78 COLUM. L. REV. 685, 687–88 (1978). A perfervid activist, Professor A. S. Miller, considers it "rather doubtful that the historical record is so 'inconclusive' as Chief Justice Warren asserted . . . ." Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 674 n.48 (1960). Again and again Ely refuses to face unpalatable facts.

Court displace the framers' unmistakable exclusion of suffrage by its own values.[71] It will be instructive to follow the convoluted path by which Ely arrives at the *Carolene* footnote.

INTERPRETIVISM V. NONINTERPRETIVISM

Ely labels the opposing camps interpretivism—enforceable norms are derived from the Constitution—and noninterpretivism—norms drawn from outside the document.[72] The noninterpretivist, he says, "would have politically unaccountable judges select and define the values to be placed beyond majority control . . . ."[73] By insisting that neutral principles must be rooted in the Constitution,[74] by his quest for constitutional footing for his "political access" theory, Ely seems to ally himself with the interpretivists. But that is illusory, for apparently he is critical of referring our "substantive value choices . . . to the belief of people who have been dead for over a century," because not "reconcilable with the underlying democratic assumptions of our system."[75] For the argument that "[t]he people have chosen the principle . . . and have written it down in the text of the Constitution for the judges to interpret and apply"[76] is "largely a fake."[77] Originally Ely labelled the "ratification" argument a "fake" because "the Constitution is not the voice of the people; it is the voice of the framers."[78] But the framers submitted the Constitution to "the people" for ratification in order that the Constitution, in Madison's words, would be "established by the people themselves,"[79] by means, said Rufus King, of "a reference to the authority of the people expressly delegated to [State] Conventions."[80] Ely notes that ratification was "a close thing";[81] "[w]ithin a few weeks after the Constitution was made public,

---

71. "It would not do to derive the legitimacy of representation-reinforcement from . . . the one-man-one-vote cases because these cases themselves require justification and cannot be taken to support the principle advanced to support them." Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695, 698.

"The ultimate justification for the *Reynolds* ruling is hard, if not impossible, to set forth in constitutionally legitimate terms. It rests, rather, on the view that courts are authorized to step in when injustices exist and other institutions fail to act. That is a dangerous—and I think illegitimate—prescription for judicial action." Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots and Prospects*, 1979 WASH. U. L.Q. 817, 825.

72. ELY, *supra* note 1, at 1.

73. *Id.* at 8.

74. *See* Ely quotation in note 3 *supra*, *quoting* Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 949 (1973). Ely's colleague, Professor Frank Michelman, says that Ely's argument "ties its premises into the documentary Constitution." Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659, 665.

75. ELY, *supra* note 1, at vii. Acknowledging that "the states are not directly covered by the First Amendment," he asserts that "rights like these, whether or not they are explicitly mentioned, must nonetheless be protected [by judges], strenuously so, because they are critical to the functioning of an open and effective democratic process." *Id.* at 105.

76. *Id.* at 9, *quoting* Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 705 (1975).

77. *Id.* at 11.

78. Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 412 (1978).

79. 2 M. FARRAND, RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787 93 (1911). *See also id.* at 88–94.

80. *Id.* at 92.

81. Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 409 (1978).

the people were sharply aligned in two parties for or against it."[82] And he notes that "once the Constitution was ratified . . . virtually everyone in America accepted it immediately as the document controlling his destiny,"[83] as the authentic "voice of the people." Now he argues chiefly that in requiring ratification by two-thirds of Congress and three-fourths of the states for adoption of an amendment, the framers "fatally undercut the idea that in applying the Constitution . . . judges are simply applying the people's will."[84] Ely does not explain this assertion and I find it baffling. Before or after amendment, the Constitution represents the will of the people, which judges are duty-bound to "apply." Would approval by a bare majority better evidence the people's will than does two-thirds of the Congress and three-fourths of the states? Amendment *sub rosa* by unelected judges surely does not better represent the will of the people. Ely anticipates that some may regard him as a noninterpretivist, though he apparently considers his position the golden mean and brushes nomenclature aside as unimportant.[85] One can be for the Constitution or against it, but not for both at the same time; fuzzy definition conduces to fuzzy thinking. With Professor Gary Leedes, I regard Ely's "model as a belated apology for Warren Court activism,"[86] and shall show that the ninth and fourteenth amendments he relies on have been broken on the Procrustean bed of his theory.

At the outset Ely notices that a judge's attempt to go beyond the purposes of a statute to enforce "fundamental values" would verge on "lunacy," and that constitutional interpretation may be governed by similar considerations.[87] He notes that substitution of judicial policy for that of the political branches is "especially vulnerable to a charge of inconsistency with democratic theory":[88] "rule in accord with the consent of a majority of those governed is the core of American government."[89] And he concludes that "[a]n untrammeled majority is indeed a dangerous thing, but it will require a heroic inference" to regard "enforcement by unelected officials of an 'unwritten constitution' . . . [as] an appropriate response in a democratic republic."[90]

What is his "heroic inference"? The fourteenth and ninth amendments contain a "quite broad invitation to import into the constitutional decision

---

82. C. VAN DOREN, THE GREAT REHEARSAL 179 (1949).

83. Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 409 (1978).

84. ELY, *supra* note 1, at 11. *But compare* Packer, *The Aim of the Criminal Law Revisited: A Plea for a New Look at "Substantive Due Process,"* 44 S. CAL. L. REV. 490, 491–92 (1971), *quoted in* text accompanying note 64 *supra*. (1971).

85. *Id.* at 88.

86. Leedes, *The Supreme Court Mess*, 57 TEX. L. REV. 1361, 1422 (1979).

87. ELY, *supra* note 1, at 3–4, 186 n.11. For framers' application of rules of statutory construction to constitutional interpretation, *see* Berger, *"Government by Judiciary": Judge Gibbons' Argument Ad Hominem*, 59 B.U. L. REV. 783, 805–06 (1979).

88. ELY, *supra* note 1, at 5.

89. *Id.* at 7. Originally Ely noted a third consideration: "[V]ague and untethered standards" constitute a "virtually irresistible temptation" to impose one's own personal predilections. Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 403 (1978).

90. ELY, *supra* note 1, at 8.

process considerations that will not be found in the language of the amendment or the debates that led up to it."[91] In plain words, these amendments were designed to serve as a blank check to future judges. This "invitation," however, is so "frightening"[92] that Ely concludes, "[i]f a principled approach to judicial enforcement of the Constitution's open-ended provisions cannot be developed, one that is not hopelessly inconsistent with our nation's commitment to representative democracy, responsible commentators must consider seriously the possibility that courts simply should stay away from them."[93] Presumably his appeal to the *Carolene* theory is meant to supply the principles that will cabin "untethered discretion." What "frightens" him at the distance of 100 years must even more have deterred the framers, acutely distrustful of the courts, and little minded to empower them to override the framers' determination to exclude suffrage.[94] Men do not employ words to defeat their purposes.[95]

ELY'S "INVITATION" AND THE DUE PROCESS CLAUSE

Ely repudiates the Court's resort to substantive due process, emphasizing that due process is procedural and contains no "invitation to substantive oversight."[96] With this I agree. For Ely the answer may be found in the words themselves: "the word that follows 'due' is 'process.' No evidence exists that 'process' meant something different a century ago from what it does now."[97] The interpretive criterion is what did the words mean to those who used them,[98] and for this there is no need to speculate. On the eve of the Convention, Hamilton, accurately summarizing 400 years of English and colonial history,[99] declared: "The words *'due process'* have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of [the] legislature."[100] As to the respective functions of "due" and "process," the statute 25 Edw.III (1352) provided in relevant part that "none shall be taken . . . unless it be . . . by *Process* made by Writ original . . . [and] unless he be *duly* brought

91. *Id.* at 14. My extended analysis of this "invitation" was published in Berger, *Government by Judiciary: John Hart Ely's "Invitation,"* 54 IND. L.J. 277 (1979).

92. ELY, *supra* note 1, at 23. So too, an "open-textured" reading of the ninth amendment can "get pretty scary." More fully quoted in text accompanying note 246 *infra*. Again, "once 'due process' is reinvested with serious *substantive* content, things get pretty scary . . . ." ELY, *supra* note 1, at 20 (emphasis in original).

93. *Id.* at 41.

94. For citations and discussion, *see* R. BERGER, GOVERNMENT BY JUDICIARY 221–29 (1977); Berger, *The Fourteenth Amendment: Light From the Fifteenth*, 74 NW. U.L. REV. 311, 350–53 (1979).

95. Justice Holmes held that when a legislature "has intimated its will, however indirectly, that will should be recognized and obeyed . . . , it is not an adequate discharge of duty for courts to say: We see what you are driving at but you have not said it." Johnson v. United States, 163 F. 30, 32 (1st Cir. 1908); Keifer & Keifer v. R.F.C., 306 U.S. 381, 391 n.4 (1939). To the same effect, *see* statement by Judge Learned Hand in Cawley v. United States, 272 F.2d 443, 445 (2d Cir. 1959).

96. ELY, *supra* note 1, at 18, 15–18.

97. *Id.* at 18.

98. R. BERGER, GOVERNMENT BY JUDICIARY 363–72 (1977).

99. Berger, *"Law of the Land" Reconsidered*, 74 NW. U.L. REV. 1 (1979).

100. 4 THE PAPERS OF ALEXANDER HAMILTON 35 (H. Syrett & J. Cooke eds. 1962).

to Answer,"[101] that is, service of process in proper form. This and still other sources remove the need for speculation. My study of the 1866 debates convinced me that the framers had the accepted procedural meaning in mind;[102] Ely remarks that the debates are "devoid of any reference that gives the provision more than a procedural connotation."[103] We might therefore hold with Chief Justice Marshall that "to establish a principle never before recognized, [it] should be expressed in plain and explicit terms."[104]

But, opines Ely, "[t]hings are seldom so simple, . . . particularly where the intent of the framers of the Fourteenth Amendment is concerned";[105] and he dwells on *Wynehamer v. People* (1856) and *Dred Scott v. Sandford* (1857), where substantive due process was articulated.[106] Although he states that these cases "were aberrations, neither precedented nor destined to become precedents themselves," he cautions that "one cannot *absolutely* exclude the *possibility* that *some* of [the framers], had the question been put, would have agreed that the Due Process Clause they were including could be given an occasional substantive interpretation."[107] Such is the "nonsense"[108] by which Ely would obscure "the intent of the framers." It is a skewed approach to construction to suggest that a hypothetical *possibility* that *some* framers might have entertained "substantive" notions be *absolutely* excluded. In his own words, "it should take more than occasional aberrational use to establish that those who ratified the Fourteenth Amendment had an eccentric definition in mind."[109] Nor is Ely's renunciation of due process wholehearted, for he calls for invalidation if "due process of law making" by the legislature was denied,[110] ignoring Hamilton's declaration that the words "can never be referred to an act of the legislature," being confined to procedure in judicial proceedings.

ELY'S "INVITATION" AND THE "PRIVILEGES OR IMMUNITIES" CLAUSE

The "privileges or immunities" clause says Ely, "seems on its face to convey the sort of substantive review authority" missing from the due process clause, "a delegation to future constitutional decision-makers to protect rights that are not listed either in the Fourteenth Amendment or elsewhere in

101. Statute of Purveyors, 25 Edw. III, st.5, ch.4(1350) (emphasis added). *See* R. BERGER, GOVERNMENT BY JUDICIARY 197–98 (1977).

102. R. BERGER, GOVERNMENT BY JUDICIARY 201–06 (1977). *See also* Berger, *The Fourteenth Amendment: Light From the Fifteenth*, 74 NW. U.L. REV. 311, 334–35 (1979). For example, James Wilson stated: "The citizen is entitled to the right of life, liberty and property. Now if a State intervenes and deprives him, without due process of law, of these rights . . . , have we no power to make him secure in these priceless possessions." CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866).

103. ELY, *supra* note 1, at 15.

104. United States v. Burr, 25 F. Cas. 55, 165 (C.C. Va. 1807) (No. 14,693).

105. ELY, *supra* note 1, at 15–16.

106. *Id.*

107. *Id.* at 16 (emphasis added).

108. So Ely describes an opinion of Chief Justice Warren. *Id.* at 121.

109. *Id.* at 18.

110. *Id.* at 138.

the document."[111] Unfortunately, "it has to all intents and purposes been dead for a hundred years," having been aborted by the *Slaughter House Cases*,[112] in an interpretation that "persists to the present day."[113] Thus, Ely would invest the Court with "frightening" discretion by a clause from which it has turned its face for over one hundred years. Then there is the fact, Ely notes, that "[t]he Equal Protection Clause is directly concerned with equality (and it is no small problem for the suggested interpretation of the Privileges or Immunities Clause that it would render the Equal Protection Clause superfluous)."[114] It is in fact an insurmountable problem because the draftsmen are "presumed to have used no superfluous words"; a contrary construction is to be rejected.[115] Even so, he concludes that "the slightest attention to the language will indicate that it is the Equal Protection Clause that follows the command of equality strategy, while the Privileges or Immunities Clause proceeds by purporting to extend to everyone a set of entitlements."[116] Nevertheless, he considers the clause "quite inscrutable, indicating only that there should exist some set of constitutional entitlements not explicitly enumerated in the document," and he seeks "guides to construction."[117] How can the framers' unmistakable determination to exclude suffrage be overcome by this "inscrutable language"; how can "inscrutable language" be construed as an "invitation" to judges to reverse the framers' intention?[118] Ely does not explain. In truth he muddies the waters, for the framers made quite plain the limited scope of the privileges or immunities clause.

Inquiry starts with the Civil Rights Act of 1866, which proceeded on a parallel track with the amendment in the thirty-ninth Congress, which was enacted at the same session, and which the amendment was designed to embody and

---

111. *Id.* at 22, 30.

112. 83 U.S. (16 Wall.) 36 (1873).

113. ELY, *supra* note 1, at 22.

114. *Id.* at 24. Justice Stone wrote of a suggested interpretation that "it would seem to add nothing to the guarantee of the equal protection clause . . . . In that case discourse upon the privileges and immunities clause would appear to be a gratuitous labor of supererogation." Colgate v. Harvey, 296 U.S. 404, 447 (1935) (dissenting, joined by Brandeis and Cardozo, J.J).

115. Platt v. Union Pac. R.R., 99 U.S. 48, 58–59 (1878); Adler v. Northern Hotel Co., 175 F.2d 619, 621 (7th Cir. 1949).

116. ELY, *supra* note 1, at 24.

117. *Id.* at 98.

118. In an analogous situation the Court, per Justice Douglas, stated: "The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them." Monroe v. Pape, 365 U.S. 167, 191 (1961)(footnote omitted).

Justice Miller stated that the privileges and immunities clause did not contemplate the "transfer [of] the security and protection of all the civil rights we have mentioned from the States to the Federal goverment," that despite "the excited feeling growing out of war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights—the rights of person and property—was essential . . . ." And he declined to embrace a construction that would so degrade the states and subject them to "the control of Congress . . . in the absence of language which expresses such a purpose too clearly to admit of doubt." Slaughter House Cases, 83 U.S. (16 Wall.) 36, 77, 82, 78 (1872). *See also* Pierson v. Ray, 386 U.S. 547, 554–55 (1967); United States v. Burr, 25 Fed. Cas. 55, 165 (C.C. Va. 1807)(No. 14,693)(per Marshall, C.J). Bingham, draftsman of the fourteenth amendment, rejected the antecedent "civil rights and immunities" precisely because it was so "oppressively" broad. *See* text accompanying notes 130–33 *infra*.

protect from repeal. Charles Fairman justly wrote that they were treated as "essentially identical";[119] for example, George Latham of West Virginia stated that the Act "covers exactly the same ground as this amendment."[120] Henry Raymond said the Congress proposed by the Civil Rights Bill "to exercise precisely the powers which that [Bingham] amendment was intended to confer."[121] Harry Flack, a devotee of a broad construction of the amendment, wrote, "nearly all said it was but an incorporation of the Civil Rights Bill . . . , there was no controversy as to its purpose or meaning,"[122] and I found no contradictory remarks in the records. Flack was echoed by others.[123] In *Reiche v. Smythe*,[124] the Court held that if two acts are *in pari materia*, "it will be presumed that if the same word be used in both, and a special meaning were given it in the first act, that it was intended it should receive the same interpretation in the latter act, in the absence of anything to show a contrary intention."[125]

---

119. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 44 (1949).

120. CONG. GLOBE, 39th Cong., 1st Sess. 2883 (1866).

121. *Id.* at 2502.

122. H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 81 (1908).

123. Howard Jay Graham, an ardent activist, wrote that "[v]irtually every speaker in the debates on the Fourteenth Amendments—Republicans and Democrats alike—said or agreed that the Amendment was designed to embody or incorporate the Civil Rights Act." H. GRAHAM, EVERYMAN'S CONSTITUTION 291 n.73 (1968). For citations to similar remarks by Alexander Bickel, Jacobus tenBroek and Benjamin Kendrick, *see* R. BERGER, GOVERNMENT BY JUDICIARY 23 n.13 (1977). Ignoring such evidence, confirmed by the holdings of Justices Bradley and Field that the two were equivalent, *see* text accompanying notes 147–50 *infra*, Ely argues that "equivalence in coverage is not established either by the undeniable premise that the two 'bore an extremely close relationship' to one another . . . or by the equally undeniable fact that part of the purpose of the amendment was to provide an impeccable constitutional basis for the Act." ELY, *supra* note 1, at 198 n.66. But it *is* established by the framers' statements that they were "identical." In an effort to downgrade the evidence, Ely states that "there were *some* [initially he said "rare," Ely *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 434 n.129 (1978)] actual statements of equivalence, though generally couched in terms that made clear the speaker's understandable desire to minimize the potentially radical sweep of the constitutional language." ELY, *supra* note 1, at 199 n.66 (emphasis added). Those statements were never contradicted or challenged. And why does Ely disparage "some" actual statements here while worrying that "one cannot absolutely exclude the *possibility* that some" of the framers *might* have harbored substantive due process notions? *See* text accompanying note 109 *supra*. His gloss—an "understandable desire to minimize the radical sweep of constitutional language," ELY, *supra* note 1, at 199 n.66—euphemistically defends hoodwinking the public; it condones concealment of radically sweeping designs from a constituency that would reject them if made plain, as with suffrage and segregation.

Impervious to the impact of facts on his theorizing, Ely repeats his charge, "The shorthand that the amendment 'embodied' the act is used by Berger in accordion fashion. Introduced to mean that the amendment was intended to 'remove doubts as to [the Act's] constitutionality and to place it beyond the power of a later Congress to repeal' . . . , at other points it is invoked to suggest equivalence of coverage. . . . This sort of elision permeates Berger's argument." ELY, *supra* note 1, at 199 n.66. It is sorry scholarship which can repeat such canards without taking account of my reply: "Ely . . . confuses two separate analytical strands. The framers' desire to protect the act constituted the *motivation* for the Amendment; the 'equivalence' goes to an entirely different issue—the *scope* of the Amendment." Berger, *Government by Judiciary: John Hart Ely's "Invitation,"* 54 IND. L.J. 277, 295 (1979). That Ely is constrained to distort the evidence that the framers regarded Act and Amendment as "identical" betrays the shakiness of his argument. Finally, whether or not they were "identical," an interpreter may not construe the Amendment in contradiction of the Act "embodied" therein.

124. 80 U.S. (13 Wall.) 162 (1871).

125. *Id.* at 165. Summarizing Harry Flack, Justice Black, architect of the "incorporation" doctrine, stated: "'The declarations and statements of newspapers, writers and speakers . . . show very clearly, . . . the general opinion held in the North. The opinion, briefly stated, was that the Amendment embodied the Civil Rights Bill.'" Adamson v. California, 332 U.S. 46, 110 (1947) (Black, J., dissenting).

The Civil Rights Act of 1866

The Civil Rights Bill provided in pertinent part:

> [T]here shall be no discrimination in *civil rights or immunities* among the inhabitants . . . on account of race, but the inhabitants . . . shall have the same right to make and enforce contracts, to sue . . . , to hold and convey real and personal property, and full and equal benefits of all laws and proceedings *for the security of person and property* . . . .[126]

Martin Thayer of Pennsylvania stated that "to avoid any misapprehension" as to what the "*fundamental rights* of citizenship" are, "they are stated in the bill. The same section goes on to define with greater particularity the civil rights and immunities which are to be protected by the bill."[127] And, he added, "when those civil rights which are first referred to in general terms in the bill are subsequently enumerated, that enumeration precludes any possibility that the general words which have been used can be extended beyond the particulars which have been enumerated."[128] There were similar restrictive explanations.[129] "Civil rights or immunities" was therefore to have a restrictive meaning. Notwithstanding such assurances, John Bingham, a draftsman of the fourteenth amendment, protested that the "civil rights and immunities" phrase was "oppressive," that it would "embrace every right that pertains to the citizen as such" and strike down "every State constitution which makes a discrimination on account of race or color in any of the civil rights of the citizen."[130] In short, he opposed striking down *all* racial discriminations, and at his insistence the phrase was deleted, as James Wilson, chairman of the House Judiciary Committee explained, to obviate a "construction going beyond the specific rights named in the section,"[131] "a latitudinarian construction not intended."[132] Ely does not explain why Bingham, who rejected "civil rights and immunities" as "oppressive," turned around and adopted "privileges or immunities," which Ely considers "a delegation to future constitutional decision-makers to protect certain rights that the document neither lists, at least not exhaustively, nor in any specific way gives directions for finding."[133]

---

126. A. AVINS, THE RECONSTRUCTION AMENDMENT DEBATES 121 (1967) (emphasis added).

127. CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866) (emphasis added).

128. *Id.*

129. For citations, *see* R. BERGER, GOVERNMENT BY JUDICIARY 27–31 (1977).

130. CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866) (emphasis added).

131. *Id.* at 1367.

132. *Id.* at 1366. William Lawrence stated that Bingham placed on the "civil rights and immunities" of the Civil Rights Bill, "an interpretation different from the committee who reported it. But for the purpose of obviating his objection this clause was stricken out." CONG. GLOBE, 39th Cong., 1st Sess. 1837 (1866). In Georgia v. Rachel, 348 U.S. 780, 791–92 (1966), the Court stated, "The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights . . . . [T]he Senate bill did contain a general provision forbidding discrimination in civil rights and immunities preceding the specific enumeration of rights. . . . Objections were raised in the legislative debates to the breadth of the rights of racial equality that might be encompassed by a prohibition so general . . . . [A]n amendment was accepted [in the House] striking the phrase from the bill."

133. ELY, *supra* note 1, at 28.

Instead he turns for his "quite inscrutable" formula to a number of red herrings, preferring to the framers' own unequivocal explanation a rambling "dictum" of Justice Bushrod Washington in *Corfield v. Coryell* (1823),[134] on which Raoul Berger allegedly "places great reliance in his book, as having construed the Article IV provision narrowly."[135] Instead of *relying* on it, I took great pains to show that its holding was narrow.[136] At issue was the meaning of article IV, § 2; the antecedent thereof was article IV of the Articles of Confederation, which entitled inhabitants of the different States "to all privileges and immunities of free citizens in the several states . . . [to] enjoy therein all the privileges of *trade and commerce,* subject to the same duties, impositions and restrictions as the inhabitants thereof . . . ."[137] For the founders, the enumerated "privileges of trade and commerce" limited the general "privileges and immunities."[138] Article IV of the Constitution borrowed the "privileges and immunities" phraseology; and two early cases construed the words in terms of "trade or commerce." So Judge Samuel Chase, soon to be appointed to the Supreme Court, held on behalf of the Maryland Court in *Campbell v. Morris* (1797)[139] that the words had a "particular and limited meaning," that is, the "peculiar advantage of acquiring and holding real as well as personal property," which were to have the "same" protection as that of the state citizens.[140] Speaking for the Massachusetts Court, Chief Justice Parker held in *Abbott v. Bayley* (1827)[141] that the article IV phrase allows an out-of-state citizen to "take and hold real estate," to "sue and be sued," but not "the right of suffrage."[142]

Ely ignores these cases and seizes on Justice Washington's *Corfield* dictum because Washington made a "fatal [to Berger] reference to the right 'to pursue and obtain happiness and safety,'" and in "essence . . . feels 'no

---

134. 6 F. Cas. 546 (C.C.E.D. Pa. 1823)(No. 3,230). Ely notes that this "was the opinion of a single justice, it was *dictum.*" ELY, *supra* note 1, at 29 (emphasis in original).

135. ELY, *supra* note 1, at 198 n.64.

136. R. BERGER, GOVERNMENT BY JUDICIARY 31-33 (1977).

137. H. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 111 (7th Ed. 1963) (emphasis added).

138. Madison stated: "For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general powers? Nothing is more natural or common than first to use a general phrase, and to explain and qualify it by a recital of particulars." THE FEDERALIST NO. 41 at 269 (J. Madison)(Mod. Lib. ed. 1937).

139. 3 H. & McH. 535 (Md. 1797).

140. *Id.* at 554.

141. 6 Pick. 89 (Mass. 1827).

142. *Id.* at 91. Consequently Ely misstates the import of article IV: "This was an equality provision, intended to keep states from treating outsiders worse than their own citizens." ELY, *supra* note 1, at 23. And he says article IV represents "'simply'" the guarantee that "*whatever* entitlements those living in a state see fit to vote themselves will generally be extended to visitors." *Id.* at 83 (emphasis added). For his own oracle, Bushrod Washington held that an out-of-stater could not dredge for oysters. As Judge Chase held, the words had a "limited meaning." *Compare* Yates v. United States, 354 U.S. 298, 319 (1957), in which Justice Harlan stated: "We should not assume that Congress . . . used the words 'advocate' and 'teach' in their ordinary dictionary meanings when they had already been construed as terms of art carrying a special and limited connotation." Chief Justice White stated in United States v. Wheeling, 254 U.S. 281, 294 (1920), that "the Constitution plainly intended to preserve and enforce the limitations as to discrimination imposed by Article IV of the Articles of Confederation . . . , the text of Article IV, § 2 of the Constitution makes manifest that it was drawn with reference to the corresponding clause of the Articles of Confederation and was intended to perpetuate its limitations."

hesitation in confining' privileges and immunities to everything but the kitchen sink."[143] Notwithstanding, Washington *held* that a Pennsylvania citizen could not dredge for oysters in Delaware waters, drastically limiting the "pursuit of happiness" in Delaware. Although Washington generously threw in suffrage, Senator Lyman Trumbull, draftsman of the Civil Rights Bill, said, "[t]his judge goes further than the bill," including "the elective franchise."[144]

After reading from the several cases, Trumbull stated that "the great fundamental rights set forth in this bill . . . [are] the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property. These are the very rights that are set forth in this bill,"[145] as its text corroborates. Justice Field stated, and the record bears him out, that *Corfield v. Coryell* "was cited by Senator Trumbull with the observation that it enumerated the very rights belonging to a citizen of the United States set forth in the first section of the act."[146] Ely would substitute for the particularized enumeration of the bill, which Thayer and Trumbull so carefully stressed, an overblown 1823 dictum that is contrary to the framers' intention, as Trumbull plainly indicated.

That the particularization of the Act was incorporated in the "privileges or immunities clause" was the holding of Justice Bradley in 1870: "[T]he civil rights bill was enacted at the same session, and but shortly before the presentation of the fourteenth amendment . . . , [it] was in pari materia; and was probably intended to reach the same object . . . , the first section of the bill covers the same ground as the fourteenth amendment."[147] What Bradley thought "probable" was in fact the uncontradicted view of the framers that Act and amendment were "identical." Led by Justice Field, the four dissenters in the *Slaughter House Cases*[148] asked: "What then are the privileges and immunities which are secured against abridgement by State legisla-

143. ELY, *supra* note 1, at 198 n.64.

144. CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866). Professor Fairman comments, "It would have sufficed for Justice Washington to say, simply, that the visitor had no constitutional right to share in the public patrimony, such as oyster beds . . . . Doubtless Justice Washington's words, as reported, far overleaped his thought." It would "have been preposterous" to suppose "that he meant" that the framers intended to widen the Article of Confederation obligation "to charge each State to accord to citizens from sister States whatever the Supreme Court might hold to be 'fundamental' in 'free governments,' regardless of whether the State made any such provision for its own citizens [much less to compel States to make such provisions for its own citizens by an Article referring to those of sister States]." 6 C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1122–23 (1971). *See also* notes 156 and 159 *infra*.

145. *Id.* Ely stresses that "the significance for a responsible interpretation of the Fourteenth Amendment is the fact that *that* amendment's framers repeatedly adverted to the *Corfield* discussion as the key to what they were writing." ELY, *supra* note 1, at 29 (emphasis in original). He ignores references to the other cases which construed article IV narrowly, and Trumbull's own identification of *Corfield* with the privileges enumerated in the Act. Trumbull was chairman of the Senate Judiciary Committee and draftsman of the Act.

146. Slaughter House Cases, 83 U.S. (16 Wall.) 36, 98 (1872)(Field, J., dissenting).

147. Live Stock Dealers & Butchers Ass'n v. Crescent City Live Stock Co., 15 F. Cas. 649, 655 (C.C.D. La. 1870)(No. 8,408). It is a marvelous feat, against this background, to convert the "inscrutable" privileges or immunities clause, *see* text accompanying note 117 *supra*, into a "guarantee of virtual representation to the virtually powerless." ELY, *supra* note 1, at 91.

148. 83 U.S. (16 Wall.) 36 (1872).

tion,"[149] and answered: "In the first section of the Civil Rights Act Congress has given the interpretation of these terms . . . , [including] the right 'to make and enforce contracts [etc.].'"[150]

Against this background, to insist that the "statute and the . . . constitutional provision, *say very different things,*" and "the choice of a vague or open-ended term should, in the absence of contrary evidence, be assumed to have been conscious,"[151] is to prefer "inscrutability" to the unmistakable understanding of the framers. It perverts the historical intention to argue that "one way of ensuring substantial equality is by designating a set of goods that no one can be denied,"[152] and to urge that "the cause of equality for blacks" was "the amendment's overall animating purpose."[153] For the framers made emphatically plain that *only* the enumerated "goods" were protected against discrimination, as will even more clearly appear in the subsequent discussion of the equal protection clause.

Ely moves beyond protection from discrimination to argue that the privileges or immunities clause "seems to announce rather plainly that there is a set of *entitlements* that no state is to take away,"[154] "which states are not to deny to anyone."[155] After the historical facts to the contrary were set before him,[156] one might expect that Ely would abandon his "entitlements" reading; but no, his pet theory is impervious to fact. The bill, Shellabarger explained, "secures . . . equality of protection in those enumerated civil rights *which the States may deem proper to confer* upon any races."[157] Trumbull declared that "if the State of Kentucky makes no discrimination in civil rights between its citizens, this bill has no operation whatever in the State of Kentucky."[158] And he reiterated that it "in no manner interferes with the municipal regulations of any State which protects all alike in their rights of person and property."[159] Thaddeus Stevens, leader of the Radicals, stated that the amendment

---

149. *Id.* at 96.

150. *Id.*

151. ELY, *supra* note 1, at 199 n.66 (emphasis in original).

152. *Id.* at 23.

153. *Id.*

154. *Id.* at 24 (emphasis added).

155. *Id.* at 25.

156. *See* Berger, *Government by Judiciary: John Hart Ely's "Invitation,"* 54 IND. L.J. 277, 298–99 (1979). Professor Charles Fairman labels as "preposterous" the notion that the framers meant to "charge each State to accord to citizens from sister States whatever the Supreme Court might hold to be 'fundamental' in 'free governments' regardless of whether the States made any such provision for its own citizens. At any rate, it would have taken much more than a dictum from a Justice on circuit [in *Corfield v. Coryell*] to establish such a proposition." 6 C. FAIRMAN, HISTORY OF THE SUPREME COURT 1123 (1971). Justice Miller held that article IV did not "profess to control the power of the State governments over the rights of its own citizens." "Its sole purpose" was to prevent discrimination against out-of-state visitors with respect to rights granted to residents, and this despite citing *Corfield v. Coryell.* Slaughter House Cases, 83 U.S. (16 Wall.) 36, 77, 75–76 (1872).

157. CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866) (emphasis added).

158. *Id.* at 600.

159. *Id.* at 1761. In 1873 the Court declared per Justice Miller: "[T]he most liberal advocates of the rights conferred by that amendment have contended for nothing more than that the rights of the citizens previously existing, and dependent wholly on State laws for their recognition, are now placed under the protection of the Federal Government." Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129, 133 (1873). On behalf of his three fellow

> allows Congress to correct the unjust legislation of the States, *so far* that the law which operates on one shall operate equally upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way. . . . Your civil rights bill secures the same thing.[160]

Such was the purpose embodied in the fourteenth amendment, as a Reconstruction historian that Ely cites has written: "Instead of formulating positively national civil-rights minima . . . the Amendment forbade unequal deprivation of the broad, uncodified mass of civil rights protections which a State *professed to afford* . . . ."[161]

Incorporation of the Bill of Rights

Ely seeks to revive Justice Black's view that the Bill of Rights was incorporated in the fourteenth amendment, but the Court itself, as Thomas Grey observed, "clearly has declined" to accept "the flimsy historical evidence" proffered by Black.[162] A fastidious scholar, Charles Fairman, Bickel wrote, "conclusively disproved Black's contention; at least such is the weight of opinion among disinterested observers."[163] Now Ely stamps that view as "voguish," but it "isn't so voguish any more," citing Alfred Kelly and

---

dissenters in the *Slaughter House Cases*, Justice Field stated, "The Amendment does not attempt to confer any new privileges or immunities upon citizens." 83 U.S. (16 Wall.) 36, 95 (1872).

Further confirmation is furnished by Senator William Stewart's explanation that the purpose of the Civil Rights Bill "is simply to remove the disabilities existing by laws tending to reduce the negro to a system of peonage. It strikes at that; nothing else." If all the Southern States, he continued, will repeal such laws, "this civil rights bill . . . will simply be a nullity. When peonage in all its forms is abolished . . . your bill has no operation." CONG. GLOBE, 39th Cong., 1st Sess. 1785 (1866).

160. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (emphasis added). In the House, Shellabarger said of the antecedent Civil Rights Bill, "Its whole effect is not to confer or regulate rights, but to require that whatever of these enumerated rights and obligations are imposed by State laws shall be for and upon all citizens alike . . . ." *Id.* at 1293. 1st Sess. 1293 (1866). So too, Giles Hotchkiss of New York was willing to provide "that no State shall discriminate between its citizens" but opposed an attempt "to authorize Congress to establish uniform laws . . . upon the subject named, the protection of life, liberty and property." *Id.* at 1095. In the House, William Lawrence explained that the Civil Rights Bill "does not confer any civil right . . . , all these are left to the States. But it does provide that as to certain enumerated civil rights" what "may be enjoyed by any shall be shared by all citizens in each State." *Id.* at 1832. His New York colleagues, Robert Hale and Thomas Davis, shared Hotchkiss' view, and the proposal was jettisoned. For discussion, *see* R. BERGER, GOVERNMENT BY JUDICIARY 185–87 (1977).

161. H. HYMAN, A MORE PERFECT UNION 467–68 (1973) (emphasis added). What Ely misses was perfectly understood by Horace Burchard of Illinois in the 1871 debates: the equal protection clause "does not enjoin upon the State that it shall provide protection by its laws, but that it shall not discriminate in that protection." CONG. GLOBE, 42d Cong., 1st Sess., App. 315 (1871). Justice Field held that the fourteenth amendment "only limits discriminating and partial enactments, favoring some to the impairment of the rights of others," and does not transfer "to the federal government the protection of all private rights." Butchers' Union Co. v. Crescent City Co., 111 U.S. 746, 759 (1884)(concurring opinion). *See* note 159 *supra*.

Ely himself notices, without appreciating the effect on his "entitlements" argument, that "Article IV conveys no set of substantive entitlements, but 'simply' the guarantee that whatever entitlements those living in a state see fit to vote themselves will generally be extended to visitors." ELY, *supra* note 1, at 83. The intention of the framers of the fourteenth amendment to protect only a set of enumerated privileges from discrimination is even more clearly documented.

162. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV 703, 711–12 (1975).

163. A. BICKEL, THE LEAST DANGEROUS BRANCH 102 (1962). *See* Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

Howard Jay Graham, two arrant wishful thinkers.[164] He considers that the "legislative history argument is one neither side can win," and balances Black's argument that the "privileges or immunities" clause was an "eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States," against "a point that seems equally strong on the other side . . . , the incorporation would include the Fifth Amendment's Due Process Clause, and the Fourteenth Amendment's Due Process Clause would be superfluous."[165] The latter point is incontrovertible; the former "eminently" unreasonable. The "privileges and immunities" of article IV antedated the Bill of Rights; it assured out-of-staters that the states could not discriminate against them in matters of "trade or commerce." Self-evidently, it could not include the later Bill of Rights, which largely was designed to protect all individuals against deprivation by the federal government of hallowed criminal procedural rights. A contemporaneous construction by a Report of the House Committee on the Judiciary in 1871 repels "incorporation":

> The clause of the fourteenth amendment, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," does not in the opinion of the committee, refer to privileges and immunities of citizens of the United States *other than* those privileges and immunities embraced in the original text of the Constitution, article 4, section 2. The fourteenth amendment, it is believed, *did not add* to the privileges or immunities before mentioned . . . .[166]

Then too, the derivation of the "privileges or immunities" clause of the fourteenth amendment from the limited Civil Rights Act,[167] the repeated explanations that the "civil rights and immunities" clause deleted therefrom was qualified by the enumerated rights that followed, make it utterly unreasonable to read the Bill of Rights into the clause.

---

164. ELY, *supra* note 1, at 25. For documentation with respect to Kelly and Graham, *see* R. BERGER, GOVERNMENT BY JUDICIARY Index (1977). Ely overlooks Kelly's tacit recantation: under the impact of an "extraordinary revolution in the historiography of the Civil War and Reconstruction," he wrote that "the essentially federal character of the American constitutional system . . . made it impossible to set up a comprehensive and unlimited program for the integration of the negro . . . , [it] meant that the radical Negro reform program could be only a very limited one." Kelly, *Comment on Harold M. Hyman's Paper*, in NEW FRONTIERS OF THE AMERICAN RECONSTRUCTION 40, 55 (H. Hyman ed. 1966). Ely's own tendentiousness is revealed by his characterization of Professor Stanley Morrison's closely reasoned critique of Justice Black's views as a "strident attack." ELY, *supra* note 1, at 15.

165. ELY, *supra* note 1 at 27. In Hurtado v. California, 110 U.S. 516, 535 (1884), the Court observed of the fifth amendment due process clause that "when the same phrase was employed in the 14th Amendment . . . it was used in the same sense and with no greater extent . . . ." Although Ely states, "It is quite clear that the original framers and ratifying conventions intended the Bill of Rights to control only the actions of the federal goverment," ELY, *supra* note 1, at 37, he opines that the just compensation clause of the fifth amendment provides "special protection from the political process (though, on the face of the document, from *only the state political process*)." *Id.* at 97 (emphasis added).

166. H.R. REP. NO. 22, 41st Cong., 3d Sess. 1 (1871), *reprinted in* A. AVINS, THE RECONSTRUCTION AMENDMENT DEBATES 466 (1967) (emphasis added). *See* note 159 *supra*.

167. Ely notes that there "were few citations of specific purpose that went beyond the coverage of the Civil Rights Act." ELY, *supra* note 1, at 30. The only ones known to me are the Bill of Rights remarks of Howard and Bingham. Ely discreetly has chosen not to invoke Bingham, who said, "[T]he enforcement of the bill of rights . . . is one of the reserved powers of the States, to be enforced by State tribunals." CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866).

Ely pitches his case on Senator Howard's reference to "'a mass of privileges, immunities and rights, some of them secured by the second section of the fourth article of the Constitution . . . , some by the first *eight* amendments.'"[168] But this offers no support for Ely's reliance on the ninth amendment to warrant interference in local matters, for Howard stopped short with the first eight. Howard was mixing the immiscible and flying in the face of all assurances that section 1, like the Civil Rights Act, was narrow in scope. Ely cites Flack's statement that "no member of the Committee . . . questioned . . . [Howard's] statements in any particular,"[169] but Ely himself points out that not every one will "rise to correct every interpretation that does not agree with his,"[170] the less when that "interpretation" contradicts numerous assurances that Act and amendment were "identical." Even so, after Howard spoke, Senator Poland observed that the privileges or immunities clause "secures *nothing beyond* what was intended by the original [article IV] provision,"[171] a graceful correction. And Senator Doolittle remarked that the Civil Rights Bill "was the forerunner of this constitutional amendment."[172] Such reminders of known and limited objectives were intended to reassure those whose consent had thus far been won to a narrow, not unlimited, program.

Earlier, Ely concluded that

> although neither the ratified language nor what is known of the intentions that generated it fairly compels the conclusion that the provisions of the Bill of Rights were to be counted among the privileges and immunities of citizens, there is at the same time nothing in that language or those intentions that should preclude that result,[173]

adding that "the legislative history argument is one neither side can win."[174] In that case Ely's argument collapses. First, given that the article IV "privileges and immunities" did not comprehend the subsequent Bill of Rights, Ely has the burden of proving that the framers intended to depart from that meaning, under Chief Justice Marshall's requirement that "a principle never

---

168. ELY, *supra* note 1, at 26, *quoting* CONG. GLOBE, 39th Cong., 1st Sess. 2765–66 (1866) (emphasis added).

169. *Id.* at 195 n.57.

170. *Id.* at 17. Ely taxes me with inconsistency in accepting "Justice Harlan's argument on voting rights but reject[ing] Justice Black's similarly contoured argument on incorporation," apparently because both rely on Senator Howard. *Id.* at 236 n.36. Howard's remarks that section 2 shows that suffrage was excluded from section 1, *see* text accompanying notes 58–62 *supra*, reflected the widely shared view of the framers, expressed on the face of section 2. And Howard himself categorically stated that suffrage was excluded. *See* note 58 *supra*. But his reference to the inclusion of the Bill of Rights in the privileges or immunities clause stood alone but for a similar remark by Bingham, and it was contradicted by the history detailed above. For his statement that Harlan's reference to the relations between sections 1 and 2 "seems shaky in light of the separate development of the two sections," ELY, *supra* note 1, at 235 n.36, Ely relies on an article by Professor William Van Alstyne, without taking account of the 42 pages I devoted to a refutation, once more betraying his habit of citing only such materials as can be fitted into his theory, never mind the mass of historical data to the contrary.

171. CONG. GLOBE, 39th Cong., 1st Sess. 2961 (1866) (emphasis added).

172. *Id.* at 2896. *See also* text accompanying notes 119–22 *supra*.

173. Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 432 (1978).

174. *Id.* at 430. *But compare* text accompanying notes 147–50, 166 *supra*.

before recognized should be expressed in plain specific terms."[175] Second, the reservation to the states by the tenth amendment of "powers not delegated to the United States" is not to be curtailed by "inscrutable" words. When the invasion of those reserved powers is of such magnitude as "incorporation" represents, it demands proof that such was the framers' intention.[176] Senator Frederick Frelinghuysen, a framer who construed the fourteenth amendment broadly, said in 1871 that the "amendment must . . . not be used to make the General Government imperial. It must be read . . . together with the tenth amendment."[177] We need to recall Madison's assurance in *Federalist No. 39* that the federal "jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and *inviolable* sovereignty over all other objects," and that in "controversies relating to the boundary between the two jurisdictions" the Court is to decide "impartially . . . according to the rules of the Constitution."[178] Had the states been advised that the Court would decide those boundary issues by resort to values outside the Constitution, it is safe to say that the Constitution would have been rejected. Such was the tenacious attachment of the people to their states that they insisted on confining enforcement of the Constitution and federal laws to state courts, with appeal to the Supreme Court.[179]

And what has become of Ely's call for proof of endorsement by the *ratifiers*? It is sheer cant to insist upon it with respect to the exclusion of suffrage which undeniably reflected popular demand and drop it with respect to the Bill of Rights where such sentiment was altogether lacking. Flack gathered from the contemporary prints that the people considered that the amendment "embodied" the Civil Rights Act, but found no published statement that "the first eight amendments were to be made applicable to the States."[180] Fairman confirmed that but for the New York Herald and the New York Times, no newspaper reported Howard's remarkable expansion of the privileges or immunities clause, notwithstanding that incorporation of the Bill of Rights would drastically reduce state self-rule, so dear to the men of 1866.[181] And he added that Howard's remark "seems at the time to have sunk without leaving a trace in public discussion."[182] Here, if anywhere, proof is

175. *See* text accompanying note 104 *supra*.

176. Justice Frankfurter asked Justice Black, "Is it conceivable that an amendment" establishing a "uniform system of judicial procedure" could "have been submitted" or "ratified." G. DUNNE, HUGO BLACK AND JUDICIAL REVIEW 261 (1977).

177. CONG. GLOBE, 42d Cong., 1st Sess. 501 (1871).

178. THE FEDERALIST NO. 39 at 249 (J. Madison)(Mod. Lib. ed. 1937) (emphasis added).

179. R. BERGER, CONGRESS V. THE SUPREME COURT 260–63 (1969).

180. H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 153 (1908).

181. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 68–69 (1949). On the other hand, Senator John Sherman, explaining the fourteenth amendment to the electorate in Cincinnati, said: "The first section was an embodiment of the Civil Rights Bill, namely: that every body . . . should have the right to go from county to county, and from State to State, to make contracts, to sue and be sued, to contract and be contracted with; that is the sum and substance of the first clause." *Id.* at 77.

182. *Id.* at 69.

called for that the ratifiers considered they were surrendering cherished self-rule.

Proof beyond cavil that the framers did not consider that the fourteenth amendment incorporated the Bill of Rights is furnished by an amendment proposed by James Blaine in 1875, in a Congress that included twenty-three members of the thirty-ninth Congress, among them Blaine. Prior thereto he had written a letter published by the New York Times indicating that the fourteenth amendment did not prohibit states from establishing official churches or maintaining sectarian schools. Consequently he proposed that "[n]o state shall make any law respecting an establishment of religion or prohibiting the free exercise thereof":

> Not one of the several Representatives and Senators who spoke on the proposal even suggested that its provisions were implicit in the amendment ratified just seven years earlier. . . . Remarks of Randolph, Christiancy, Kernan, Whyte, Bogy, Eaton and Morton give confirmation to the belief that none of the legislators in 1875 thought the Fourteenth Amendment incorporated the religious provisions of the First.[183]

Only an invincible addiction to his theory can explain Ely's unwillingness to bow to such facts.

THE EQUAL PROTECTION CLAUSE AND ELY'S "INVITATION"

Considering the centrality of the equal protection clause for his theory, Ely's discussion is surprisingly skimpy—two pages, plus one and one-third pages on the Court's incorporation of equal protection in the fifth amendment, which he labels "gibberish."[184] His two pages contain no historical data; instead he opines that "the content of the Equal Protection Clause . . . will not be found anywhere in its terms or in the ruminations of its writers,"[185] that like the "inscrutable" privileges or immunities clause, the equal protection clause "is also unforthcoming with details."[186] So he resorts to generalities. Why, he asks, "should Justice Harlan get hung up on the specific intentions of the framers," when, "[a]s we have seen [?], the overriding intention of those who wrote and ratified the Equal Protection Clause was apparently to state a general ideal whose specific applications would be supplied by posterity."[187] As Mark Tushnet observes, Ely's "equal protection theory . . . involves arbitrariness at the stage of definition."[188] Given "inscrutable" language, that

---

183. F. O'BRIEN, JUSTICE REED AND THE FIRST AMENDMENT 116 (1958).

184. ELY, *supra* note 1, at 30–33.

185. *Id.* at 32.

186. *Id.* at 98.

187. *Id.* at 119. Professor C. Vann Woodward, dean of Reconstruction historians, wrote, "One is driven by the evidence" to conclude that "popular convictions were not prepared to sustain" a "guarantee of equality." C. WOODWARD, THE BURDEN OF SOUTHERN HISTORY 83 (1960).

188. Tushnet, *Darkness at the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1053 (1980).

is precisely the occasion for resort to "specific intentions."[189] That "specific intention" was to bar suffrage, and no "general" words can overcome that intention. Consequently Ely's statement that "[u]njustified discriminations in the distribution of the franchise fit comfortably within the language of—and just as obviously violate the ideal expressed by—the Equal Protection Clause,"[190] flies in the face of the record. Despite the deeply rooted racism earlier noted, again evidenced by what Ely describes as "white resistance, often literally murderous, to the enforcement of the Fifteenth Amendment,"[191] he understands the "Fourteenth Amendment to have been centrally concerned with eradicating" "racially prejudiced thinking."[192] And in the teeth of incontrovertible evidence that the framers excluded suffrage from the fourteenth amendment, a view acknowledged by more and more activists, Ely "comfortably" concludes that the history is "inconclusive."[193]

A few facts will suffice to show how far his theorizing is removed from fact. Time and again sweeping proposals to abolish *all* discriminations were rejected.[194] At the outset, Stevens, the Radical leader, submitted to the Joint Committee on Reconstruction a proposal that "*[a]ll* laws, state or national, shall operate impartially and equally on all persons . . . ." But in summing up in favor of the fourteenth amendment, he sadly confessed that while he had hoped to remodel "all our institutions as to have freed them from every vestige of . . . inequality of rights . . . , that *no* distinction would be tolerated . . . , this bright dream has vanished."[195] The Committee chairman, Senator William Fessenden, explained that "[w]e cannot put into the Constitution, owing to existing prejudices and existing institutions, an entire exclusion of all class distinctions."[196] Bearing in mind that the framers' exclusion of suffrage undermines Ely's "political access" theory, consider his failure to account for a "fatal" fact. In an early version of the amendment, provision was made for both "the same political rights and privileges and . . . equal

189. In the 39th Congress, Charles Sumner said that if the meaning of the Constitution "in any place is open to doubt, or if words are used which seem to have no fixed signification, we cannot err if we turn to the framers." CONG. GLOBE, 39th Cong., 1st Sess. 677 (1866).

190. ELY, *supra* note 1, at 119. His fellow activist, Paul Brest, comments that the"adoptors of the equal protection clause probably intended it not to encompass voting discrimination at all." Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 234 n.115 (1980). *See also* Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots and Prospects*, 1979 WASH. U.L.Q. 817, 825, *quoted in* note 71 *supra*..

191. ELY, *supra* note 1, at 257 n.94.

192. *Id.* at 243 n.11. *But see* note 187 *supra*.

193. ELY, *supra* note 1, at 119. On the other hand, activist Professor Lusky considers that Justice Harlan's demonstration to the contrary is "irrefutable and unrefuted." Lusky, *Book Review*, 6 HASTINGS CONST. L.Q. 403, 406 (1979). For similar activist views, *see* authorities cited in note 8 *supra*.

194. R. BERGER, GOVERNMENT BY JUDICIARY 163–64 (1977).

195. B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 46 (1914); CONG. GLOBE, 39th Cong., 1st Sess. 3148 (1866) (emphasis added).

196. CONG. GLOBE, 39th Cong., 1st Sess. 705 (1866). In discussing the fourteenth amendment, for which he voted, Senator James Patterson said he was opposed to laws discriminating against blacks "in the security and protection of life, liberty, person, property. . . . Beyond this I am not prepared to go." *Id.* at 2699. *See also* R. BERGER, GOVERNMENT BY JUDICIARY 29 n.30 (1977).

protection in the enjoyment of life, liberty and property,"[197] testimony that "equal protection" did not comprehend "political rights and privileges," but was confined to "life, liberty, and property." When "political rights and privileges" was elided, leaving "equal protection" alone, the latter patently did not include the deleted "political privileges." Ely's omission to comment on this deletion is telling.

Throughout the debates on the Civil Rights Bill, which, it will be recalled, secured only the "equal benefit of all laws for security of person and property," the framers interchangeably referred to "equality," "equality before the law," and "equal protection," but always in the circumscribed context of the rights enumerated in the bill.[198] So, Samuel Shellabarger said, "whatever rights as to each of these *enumerated* civil (not political) matters the States may confer upon one race . . . shall be held by all races in equality. . . . It secures . . . *equality of protection* in those enumerated civil rights."[199] Under the *pari materia* rule, this meaning is to be given words in the "identical" amendment.[200] This was the "content" the words had for the framers, and it renders idle Ely's speculations as to the meaning of the "inscrutable" terms. Evidence is not defeated by speculation.[201]

In truth Ely prefers to build on Professor Ronald Dworkin's philosophical construct: "'equal concern and respect in the design and administration of the political institutions.' The Fourteenth Amendment's Equal Protection Clause

---

197. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 31 (1955). "Early drafts of the Fourteenth Amendment employed language sufficiently broad to bar racial discrimination with respect to political rights; but the ultimate decision to protect interests in 'life, liberty, and property' seems to have reflected hesitation over widespread extension of political rights to Negroes." E. BARRETT, P. BURTON & J. HONNOLD, CONSTITUTIONAL LAW: CASES AND MATERIALS 804 (2d ed. 1963).

198. R. BERGER, GOVERNMENT BY JUDICIARY 169–70 (1977).

199. CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866) (emphasis added). Leonard Myers of Pennsylvania stated that the change "from slavery to freedom" requires that "each State shall provide for equality before the law, equal protection to life, liberty and property, equal rights to sue and be sued, to inherit, make contracts, and give testimony"—the very rights enumerated in the Civil Rights Act. *Id.* at 1622. *See* R. BERGER, GOVERNMENT BY JUDICIARY 169–72 (1977).

Bickel, "the preeminent noninterpretivist theorist of our age," ELY, *supra* note 1, at 186 n.11, concluded that the moderate leadership (which prevailed) had in mind a "limited and well-defined meaning . . . , a right to equal protection in the literal sense of benefiting equally from the laws for the security of person and property," A. BICKEL, THE LEAST DANGEROUS BRANCH 56 (1962), the narrow subject matter of the Act. *See* quote of Senator Sherman in note 181 *supra*. Bingham, draftsman of the fourteenth amendment, explained that it "confers upon Congress power to see to it that the protection given by the laws of the States shall be equal in respect to life and liberty and property to all persons. . . . The words 'equal protection' contain it, and *nothing else*." CONG. GLOBE, 39th Cong., 1st Sess. 1094 (1866) (emphasis added).

Life, liberty and property, Blackstone explained, meant personal security, freedom of locomotion, and the right to own property. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 129, 134, 138 (1765). Samuel Adams and James Otis considered that "the primary, absolute, natural rights of Englishmen . . . are Personal Security, Personal Liberty, and Private Property." 1 S. ADAMS, WRITINGS 65 (1904). Blackstone, and Chancellor James Kent to the same effect, were read to the framers by James Wilson and William Lawrence, CONG. GLOBE, 39th Cong., 1st Sess. 1118, 1832–33 (1866), and were summarized by Senator Trumbull as the "great fundamental rights set forth in this bill." *See* text accompanying note 145 *supra*.

200. *See* text accompanying notes 125 and 147 *supra*. Chief Justice Taney said "[t]he members of the Convention unquestionably used the words they inserted in the Constitution in the same sense in which they used them in their debates." The Passenger Cases, 92 U.S. (7 How.) 283, 478 (1849)(dissenting).

201. For citations, *see* R. BERGER, GOVERNMENT BY JUDICIARY 74 n.15 (1977).

is obviously our Constitution's most dramatic embodiment of this ideal."[202] Gary Leedes observes that Ely "adopts it as a centerpiece for his process-oriented apologia for Warren Court activism . . . ."[203] Yet Ely dismisses the notion that judges may "seek constitutional values in—that is, overrule political officials on the basis of—the writings of good contemporary moral philosophers . . . ," particularly since they "reach very different conclusions."[204] And he considers that the case that our "judiciary has done a better job of speaking for our better moral selves turns out to be historically shaky."[205] Such are the grounds from which Ely distills a "rather sweeping mandate to judge of the validity of governmental choices."[206]

Republican Form of Government

Ely turns to the "republican form of government" guarantee because "the right to vote in state elections . . . cannot be teased out of the language of equal protection alone and in textual terms is most naturally assignable to the Republican Form Clause."[207] Thus, "to be intelligible, *Reynolds v. Sims* . . . must be approached as the joint product of the Equal Protection and Republican Form Clauses."[208] But Ely's view runs counter to that of the Court, whose powers he would expand; as Dean Carl Auerbach noted, it "agreed in *Baker v. Carr* that 'any reliance' on the Guarantee clause in apportionment controversies would be futile."[209] Here, as with the privileges or immunities clause, Ely must first resurrect a clause that "has so long lain fallow."[210] Aware that in *Luther v. Borden*[211] the Court held that it is for Congress, not the Court, to determine whether a state enjoys a republican form of government, he considers that this "unfortunate doctrine," now 130 years old, "will wholly pass from the scene one of these days,"[212] and there-

---

202. ELY, *supra* note 1, at 82. Professor Michael Perry observes that Dworkin's constitutional jurisprudence proceeds from the assumption that "because the fourteenth amendment (and much else in the Constitution) is intentionally open-ended, the Court, functioning ideally as a sophisticated moral philosopher, must define the amendment's precise content," and remarks that "Berger's refutation of the notion that the fourteenth amendment was 'intentionally incomplete . . .' seriously impinges on Ronald Dworkin's constitutional jurisprudence." Perry, *Book Review*, 78 COLUM. L. REV. 685, 696 n.38 (1978).

203. Leedes, *The Supreme Court Mess*, 57 TEX. L. REV 1361, 1365 n.15 (1979). Leedes comments that both Dworkin and Ely "construct from the equal concern and respect norm a model of rights that supposedly removes the more pernicious aspects of judicial discretion" but considers that "each of their models increases . . . opportunities for the exercise of judicial discretion, and thus for the invasion of areas reserved for the political branches of government." *Id.* at 1378 n.105.

204. ELY, *supra* note 1, at 58.

205. *Id.* at 57. Ely notes that on critical occasions, e.g., the imprisonment of Eugene Debs in 1919, the later communist witch hunt (or the Japanese relocation case), the Court, as Judge Learned Hand remarked, has not been "wholly immune from the 'herd instinct.'" *Id.* at 107 n.*, 108, 112.

206. *Id.* at 32.

207. *Id.* at 118 n.*.

208. *Id.* at 122.

209. Auerbach, *The Reapportionment Cases: One Person-One Vote—One Vote-One Value*, 1964 S. CT. REV. 1, 85, *citing* 369 U.S. 186, 227 (1962).

210. ELY, *supra* note 1, at 241 n.78.

211. 48 U.S. (7 How.) 1 (1849).

212. ELY, *supra* note 1, at 118 n.*.

fore examines the issue in historical terms. Unhappily, his appeal to history is once more faulty.

Preliminarily, Ely asserts that "while it is true that many among the framers indicated their understanding that . . . [republican form] connoted what we would now call a representative democracy, for others it appears to have required only that the government not be a monarchy."[213] The two were not antithetical but complementary. In his discussion of "representative democracy" Ely quotes from *Federalist No. 39,* that to a republican government it is "*essential* . . . that it be derived from the great body of society, not from an inconsiderable proportion, or a favored class [e.g., "a handful of tyrannical nobles"]."[214] And Hamilton added: "It is *sufficient* for such a government that the persons administering it be appointed, either directly or indirectly, by the people . . . ."[215] This was the *form* that was guaranteed by the republican form clause. The guarantee "supposes," said Madison, "a preexisting government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the States they are guaranteed by the Constitution."[216] No state, Edmund Randolph said, "ought to have it in their power to change its government into a monarchy."[217] Madison summarized in *Federalist No. 43*: "[T]he superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations . . . . [The members of the Union] have the right to insist that the *forms* of government under which the compact was entered should be *substantially* maintained."[218] James Iredell observed that "consistently with this [anti-monarchical] restriction, the states may make what change in their own governments they think proper,"[219] manifestly assuring against interference with local control of suffrage. Although *Federalist No. 52* stated that the "definition of the right of suffrage is very justly regarded as a fundamental act of republican government," it concluded that the right must be left to the states because "the different qualifications in the different States [could not be reduced] to one uniform rule."[220] And alluding to the allocation of representatives according to the number of inhabitants, *No. 54* added, "the right of choosing their allotted number in each State is to be exercised by such part of the inhabitants as the State itself may designate. . . . In every State, a certain proportion of inhabitants are deprived of this right by the Constitution of the State."[221]

---

213. *Id.* at 122–23.

214. *Id.* at 6, *quoting* THE FEDERALIST NO. 39 at 244 (J. Madison)(Mod. Lib. ed. 1937)(emphasis in original).

215. THE FEDERALIST NO. 39 at 244 (J. Madison)(Mod. Lib. ed. 1937)(emphasis in original).

216. THE FEDERALIST NO. 43 at 283 (J. Madison)(Mod. Lib. ed. 1937).

217. 1 M. FARRAND, RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787 206 (1911).

218. THE FEDERALIST NO. 43 at 283 (J. Madison)(Mod. Lib. ed. 1937).

219. 4 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 195 (1836).

220. THE FEDERALIST NO. 52 at 341–42 (J. Madison)(Mod. Lib. ed. 1937).

221. THE FEDERALIST NO. 54 at 356 (J. Madison)(Mod. Lib. ed. 1937). In the Convention, Oliver Ellsworth stated, "[T]he right of suffrage was a tender point, and strongly guarded by most of the [State] Constitutions . . . . The States are the best judges . . . ." 2 M. FARRAND, RECORDS OF THE CONSTITUTIONAL

Consequently, Ely is constrained to argue that there is nothing "special about the Republican Form Clause that suggests that a line of growth or development (like that the Court has given virtually every other constitutional phrase) would be inappropriate."[222] Thereby he scuttles all pretense of rooting his theory in the Constitution and asks the Court to seek for values outside the Constitution,[223] as it has so frequently done in the recent past. And it is circular reasoning to support new activist forays by the Court's own expansionist opinions in other fields.[224] Nor does it advance his cause to cite Charles Sumner for the "propriety of a line of growth,"[225] for he was crushingly rejected by his compeers in the Thirty-ninth Congress. When Sumner argued that the guarantee clause places Congress under a duty to "see that every man votes who ought to vote," Senator Fessenden replied, "he goes considerably further than those who made the Constitution intended to go."[226] If a state, Fessenden said, "should choose to have a monarchy, or the controlling portion of the people choose to have an oligarchy, it then becomes the duty of Congress to interfere."[227] Meeting a query whether a state "should cease to be republican" if it excluded a race from the franchise, Conkling responded that this "has always been permitted with universal acquiescence by the courts and the nation."[228] Bingham, regarded as the conduit of abolitionist theology, said in July 1866 respecting the admission of Tennessee without provision for Negro enfranchisement, that if this was in violation of the guarantee, Tennessee was in the company of many northern states. His opponents were defeated by a vote of 125 to 12.[229] In the Senate, Trumbull stated, "[m]ost of us are here under republican forms of government, just like this in Tennessee."[230] Thus, Sumner's "line of growth" was rejected by the

---

CONVENTION OF 1787 201 (1911). In his 1791 Philadelphia Lectures, Justice James Wilson noted the great disparity among the States respecting the qualifications of electors, and that article I, § 2 "intrusts to . . . the several states, the very important power of ascertaining the qualifications of electors." I J. WILSON, WORKS 409, 411 (R. McCloskey ed. 1967). *See also* note 316 *infra*.

Madison wrote, "It would be happy if a state of society could be found or framed in which an equal voice in making the laws might be allowed to every individual bound to obey them. But this is a theory which, like most theories, confessedly requires limitations and modifications." *Quoted in* A. AVINS, THE RECONSTRUCTION AMENDMENT DEBATES 146 (1967).

222. ELY, *supra* note 1, at 123.

223. Yet Ely urges that "a government is not 'republican' unless the important policy issues are decided by elected officials." *Id.* at 240 n.78. "Much as liberals may not like it," Ely says, "one reason we have broadly based representative assemblies is to await something approaching a consensus before government intervenes." *Id.* at 133–34.

224. Consider judicial expansionism in light of Ely's "distrust of the self-serving motives of those in power." *Id.* at 136 n.*.

225. *Id.* at 238 n.57.

226. CONG. GLOBE, 39th Cong., 1st Sess. 706 (1866).

227. *Id.* Sumner's biographer, David Donald, comments that his program "was not taken seriously" and that his Republican colleagues greeted his resolution and bills with "total silence." 2 D. DONALD, CHARLES SUMNER AND THE COMING OF THE CIVIL WAR 234, 235, 240, 243 (1960). In fact he was "detest[ed]." *Id.* at 236. *See also* R. BERGER, GOVERNMENT BY JUDICIARY 236 (1977); Berger, *The Fourteenth Amendment: Light From the Fifteenth*, 74 NW. U.L. REV. 311, 328–29 (1979).

228. CONG. GLOBE, 39th Cong., 1st Sess. 358–59 (1866).

229. *Id.* at 3978–80.

230. *Id.* at 3988.

framers. True, a very few Radical dissentients favored his view, but it has been a cardinal vice of activist theoreticians to rely on such opposition statements although the courts dismiss them as evidence of legislative intention.[231] Given Ely's concession that "the right to vote in state elections . . . cannot be teased out of" the equal protection clause but must be yoked with the republican form clause, his "political access" theory is without support in either, and they stand no better in combination.

The Ninth Amendment

Ely realizes that in invoking the ninth amendment he faces an uphill task: "In sophisticated legal circles mentioning the Ninth Amendment is a sure fire way to get a laugh."[232] Nevertheless, after stamping Chief Justice Warren's holding in *Bolling v. Sharpe* that "the Due Process Clause of the Fifth Amendment incorporates the Equal Protection Clause of the Fourteenth Amendment" as "gibberish both syntactically and historically,"[233] Ely turns to the ninth, asserting that "such an open-ended provision is appropriately read to include an 'equal protection' component."[234] "In fact," he considers "the conclusion that the Ninth Amendment was intended to signal the existence of federal constitutional rights beyond those specifically enumerated in the Constitution is the only conclusion its language seems comfortably able to support."[235]

Ely does not, however, plainly confine his invocation of the ninth amendment to the federal domain. We are agreed that "[i]t is quite clear that the original framers and ratifying conventions intended the Bill of Rights to control only the actions of the federal government,"[236] and it therefore bears emphasis that his "federal constitutional rights" can be asserted only against the federal government, not the states, unless Ely relies on incorporation in the fourteenth amendment, which he does not cite at this point. His reference to the "existence of federal constitutional rights" requires explication. Both the rights expressed in the Bill of Rights and the unspecified rights retained by the people "exist," but only the former are "constitutional rights." For a right "retained" by the people and not described has not been embodied in the Constitution. Madison made clear that the retained rights were not "assigned" to the federal government,[237] for enforcement or otherwise; to the contrary, he emphasized that they constitute an area in which the "[g]overn-

231. *See* R. BERGER, GOVERNMENT BY JUDICIARY 157–65 (1977). For decisions, *see id.* at 160.

232. ELY, *supra* note 1, at 34. For a detailed discussion, *see* Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1 (1980).

233. ELY, *supra* note 1, at 32.

234. *Id.* at 33. *But compare* note 146 *infra* (statement by Madison), and note 260 *infra* (statement by King).

235. *Id.* at 38.

236. *Id.* at 37. As Justice Miller stated, "The adoption of the first eleven amendments . . . so soon after the original instrument was accepted, shows a prevailing sense of danger at that time from the Federal power." Slaughter House Cases, 83 U.S. (16 Wall.) 36, 82 (1872).

237. 1 ANNALS OF CONGRESS 439 (Gales & Seaton eds. 1836) (print bearing running title "History of Congress").

ment ought not to act."[238] This means, in my judgment, that the courts have not been empowered to enforce the retained rights against either the federal government or the states.

Ely himself observes: "[O]ne thing we know to a certainty from the historical context is that the Ninth Amendment was not designed to grant Congress authority *to create* additional rights, to amend Article I, Section 8 by *adding a general power to protect* rights."[239] Without protection a right is empty. And he justly points out that the phrase "'others retained by the people [is not] an apt way of saying others Congress may create.'"[240] That power of creating equally was withheld from the courts; the founders did not regard the courts as "creators" (i.e. lawmakers), but as discoverers of existing law.[241] For them the separation of powers, as Madison said in the first Congress, was a "sacred principle."[242] To this they added a "profound fear" of judicial discretion.[243] It does not therefore advance the case for judicial enforcement that "[t]here was at the time of the original Constitution little legislative history indicating that *any particular* provision was to receive judicial enforcement: the Ninth Amendment was not singled out one way or another."[244] For all the presuppositions the founders brought to the task militate against a blank check to that department, which Hamilton assured them "was next to nothing."[245] Ely himself remarks that "read for what it says the Ninth Amendment seems open-textured enough to support almost anything one might wish to argue, and that thought can get pretty scary."[246]

---

238. *See* text accompanying note 251 *infra*. A bill of rights was omitted from the Constitution, Hamilton explained in FEDERALIST NO. 84 at 559 (Mod. Lib. ed. 1937), because "a minute detail of particular rights" was better suited to a (State) "constitution which has the regulation of every species of personal and private concerns" than to the proposed federal Constitution "which is merely intended to regulate the general political interests of the nation."

239. ELY, *supra* note 1, at 37 (emphasis added).

240. *Id.*

241. "Judges conceived their role as merely that of discovering and applying existing legal rules." Horwitz, *The Emergence of an Instrumental Conception of American Law 1780–1820*, in 5 PERSPECTIVES IN AMERICAN LEGAL HISTORY 287, 296 (1971).

242. 1 ANNALS OF CONGRESS 581 (Gales & Seaton eds. 1836) (print bearing running title "History of Congress").

243. G. WOOD, CREATION OF THE AMERICAN REPUBLIC 1776–1787 298 (1969). In 1796 Chief Justice Hutchinson of Massachusetts declared, "[T]he *Judge* should never be the *Legislator*: Because then the Will of the Judge would be the Law: and this tends to a State of Slavery." *Quoted in* Horwitz, *The Emergence of an Instrumental Conception of American Law 1780–1820*, in 5 PERSPECTIVES IN AMERICAN LEGAL HISTORY 287, 292 (1971).

244. ELY, *supra* note 1, at 40 (emphasis added).

245. THE FEDERALIST NO. 78 at 504 (A. Hamilton)(Mod. Lib. ed. 1937) (emphasis added). In his 1791 Philadelphia Lectures, Justice James Wilson, a leading architect of the Constitution, explained, "[T]he executive and judicial power [prior to the revolution] . . . were derived from . . . a foreign source . . . [and] were directed to foreign purposes. Need we be surprised, that they were objects of aversion and distrust? Need we be surprised, that every occasion was seized for lessening their influence? . . . On the other hand, our assemblies were chosen by ourselves: they were the guardians of our rights, the objects of our confidence, and the anchors of our political hopes. . . . Even at this time [1791], people can scarcely devest themselves of those opposite prepossessions. But it is high time we should chastise our prejudices . . . ." 1 J. WILSON, WORKS 292–93 (R. McCloskey ed. 1967).

246. ELY, *supra* note 1, at 34. In 1830 Madison wrote, "[It] exceeds the possibility of belief, that the known advocates in the Convention for a jealous grant and certain definition of federal powers, should have silently permitted the introduction of words or phrases in a sense rendering fruitless the restrictions and definitions elaborated by them." 3 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 488 (1911). What can better illustrate the dream world in which activists fashion "open-ended" phraseology?

That thought, I venture, would have scared the founders out of their wits. And it runs against Madison's explanation that the Bill of Rights would impel the judiciary "to resist encroachments upon rights expressly stipulated for . . . by the declaration of rights,"[247] reinforcing the conclusion that courts were not empowered to enforce the retained and undescribed rights.

Ely finds Madison's explanation of the ninth amendment separating the question of "unenumerated powers" from the question of "unenumerated rights" confusing—"the possibility that unenumerated rights will be disparaged is seemingly made to do service as an intermediate premise in an argument that unenumerated powers will be implied . . . ." This "confusion" he attributes to "what we today would regard as a category mistake, a failure to recognize that rights and powers are not simply the absence of one another but that rights can cut across or 'trump' powers."[248] Whether the founders were mistaken in logic is of no moment if they acted on that mistaken view.[249] That the framers premised that rights and powers were two sides of the same coin is hardly disputable. The exceptions "in favor of particular *rights*," Madison stated, were to be regarded as "actual limitations on such *powers*."[250] The "great object" of a Bill of Rights, he said, was to "limit and qualify the *powers* of Government, by *excepting out* of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode."[251] As Ely observes, "[w]hat is important" is that Madison "wished to forestall *both* the implication of unexpressed powers *and* the disparagement of unenumerated rights," employing the tenth amendment for the one and the ninth for the other.[252] By what logic do we derive "unexpressed powers" to enforce "unenumerated rights" in the teeth of Madison's purpose

---

247. 1 ANNALS OF CONGRESS 440 (Gales & Seaton eds. 1836) (print bearing running title "History of Congress").

248. ELY, *supra* note 1, at 36. Citing Hamilton's reply in THE FEDERALIST NO. 84 at 560 (A. Hamilton) (Mod. Lib. ed. 1937), to the argument that the power of taxation could be used to inhibit freedom of expression, Ely concludes that "the possibility of a governmental act's being supported by one of the enumerated powers and at the same time violating one of the enumerated rights is one our forebears were capable of contemplating." *Id.* at 202 n.86. Hamilton rejected the notion that "the imposition of duties upon publication" would be impeded by express declarations in "State Constitutions in favor of freedom of the press," relying on the British practice of taxing newspapers. In other words, exercise of the taxing power historically did *not* violate freedom of the press.

Whether an *enumerated* power might override an "exception" in favor of an *enumerated* right need not presently detain us, though it is worth noting Madison's emphasis that *enumerated* rights were "excepted" "out of the grant of power," that they were to be regarded as actual limitations of such powers." 1 ANNALS OF CONGRESS 435, 437 (Gales & Seaton eds. 1836) (print bearing running title "History of Congress"). Here the issue is whether there is an "unexpressed power" to enforce *unenumerated* rights retained by the people."

249. C. HUGHES, THE SUPREME COURT OF THE UNITED STATES 186 (1928).

250. 1 ANNALS OF CONGRESS 435 (Gales & Seaton eds. 1836) (print bearing running title "History of Congress") (emphasis added).

251. *Id.* at 437 (emphasis added). Leslie Dunbar observed that Madison seems to have thought of rights under two main headings. One, as stipulating agreed upon methods by which in particular cases the government shall exercise powers. Secondly, he thought of another class of rights as declarations of areas *totally outside the province of government*. Madison's intention was "to define those fields into which *powers do not extend at all*." Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627, 635–36 (1956)(emphasis added).

C. C. Pinckney told the South Carolina House of Representatives that "by delegating express powers, we certainly reserve to ourselves every power and right not mentioned." 3 M. FARRAND, RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787 256 (1911).

252. ELY, *supra* note 1, at 36.

to "forestall . . . the implication of unexpressed powers," his emphasis that the enumeration of "particular rights" was not to be construed to "enlarge the powers delegated by the Constitution" but rather "as actual limitations of such powers"?[253] Is it conceivable that Madison meant to confer "open-ended" power by retaining "unenumerated rights" while limiting power by the enumeration of "particular rights"? Such a conclusion also collides with Ely's affirmation that the ninth amendment was not designed to add to article I, section 8 "a general power to protect rights."

Finally, Ely concludes that "[i]f a principled approach to judicial enforcement [of open-ended provisions] cannot be developed, one that is not hopelessly inconsistent with our nation's commitment to representative democracy, responsible commentators must consider seriously the possibility that courts simply should stay away from them."[254] The notion that the framers, so fearful of the greedy expansiveness of power,[255] would make an "open-ended," i.e., unlimited, grant, which after the lapse of 200 years is so "scary" that Ely would condemn it unless limited by a "principled" approach, verges on the "incredible."[256] And it is little less strange to assume that a Court which employed the allegedly "open-ended" terms of the fourteenth amendment,[257] despite the framers' unmistakable intention to exclude suffrage from its scope, will defer to the self-denying "principles" that Ely now proffers.

---

253. 1 ANNALS OF CONGRESS 433 (Gales & Seaton eds. 1836) (print bearing running title "History of Congress").

254. ELY, *supra* note 1, at 41.

255. The colonists feared the "endlessly propulsive tendency" of power "to expand itself beyond legitimate boundaries." B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 56–57 (1967).

256. The pejorative is borrowed from Ely's description of my views. ELY, *supra* note 1, at 200 n.66.

257. For critique of this theory, *see* R. BERGER, GOVERNMENT BY JUDICIARY 300–11 (1977). Ely has it that the framers of the fourteenth amendment issued an "open and across-the-board *invitation* to import into the constitutional decision process considerations that will not be found in the amendment nor even . . . elsewhere in the Constitution." Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 415 (1978) (emphasis added). For the untenability of this view, *see* Berger, *Government by Judiciary: John Hart Ely's "Invitation,"* 54 IND. L.J. 277 (1979).

The claim that the 1789 framers issued such an "invitation" through the medium of "open-ended" terms runs counter to Ely's own analysis. He remarks that the founders "certainly didn't have natural law in mind when the Constitution's various open-ended delegations to the future, were inserted and approved . . . ," ELY, *supra*, note 1, at 39; and he notes that "you can invoke natural law to support anything you want." *Id.* at 50. His "open-ended" theory would permit judges to impose personal, extra-constitutional values that admittedly found no favor in the shape of natural law. *See also* note 246 *supra* (statement of Madison), and note 260 *infra* (statements of Adams and King).

The founders, as Professor Philip Kurland observed, and as is well attested, were attached to a limited Constitution, one of "fixed and unchanging meaning," except as changed by amendment. P. KURLAND, WATERGATE AND THE CONSTITUTION 7 (1978). They conceived the judges' role as *policing* constitutional boundaries, not as taking over legislative functions within those boundaries, much less as revising the Constitution. For citations, *see* Berger, *Government by Judiciary: John Hart Ely's "Invitation,"* 54 IND. L.J. 277, 287 (1979). As Elbridge Gerry stated, "'It was quite foreign from the nature of the office to make them judges of the policy of public measures.'" For citations to Gerry and corroborative materials, *see id.*

Such were the presuppositions that underlie Madison's reference to protection of "stipulated rights." Ely's acknowledgement that the ninth amendment did not empower Congress to "create" additional rights, or add "a general power to protect rights," is at war with his view that the Amendment is open-ended.

It remains to be said that Professor Gerald Gunther stated, "I certainly haven't seen any case made as to the meaning of the Ninth Amendment"; and Professor Jesse Choper observed, "I just don't think it adds anything to other clauses of the Constitution." Forum, *Equal Protection and the Burger Court*, 2 HASTINGS CONST. L.Q. 645, 679 (1975).

The "Open-Ended" Theory

Although Ely is affrighted by his "open-ended" theory, it is the mainstay of his reliance on the ninth and fourteenth amendments as an "invitation" to look beyond the four corners of the Constitution, the "interpretivist's Bible."[258] Apparently the Constitution is not really *his* Bible, but merely window dressing for his activist aims. Those of us who have an abiding commitment to the Constitution do not cherish it because it was handed down from on high but because as true democrats we respect the will of the people in Convention assembled, who forged our nation and spelled out the limits of the powers they delegated. Historical fact is notably absent from Ely's theorizing; for him the words themselves suffice to reveal that they are "open-textured."[259] But Samuel Adams, the archetypal founder, stated: "Vague uncertain laws, and more especially Constitutions, are the very instruments of slavery."[260] Such men would not resort to words of "uncertain" and "scary" content to disguise their purposes.

Activists generally approach the role of the Supreme Court as if *they* were distributing constitutional power, rarely pausing to ask: what powers did the framers allocate to the judiciary? Ely remarks: "Judicial review was not even a clearly contemplated feature of the original Constitution (though it is certainly a bona fide feature of today's)."[261] If, however, the power was not originally granted, how did it find its way into the Constitution? And given a dubious grant, judicial revision of the Constitution or displacement of legislative policy choices is the grossest usurpation, particularly because, as Ely notices, "[R]ule by an aristocracy, even in modern dress, is not what Americans have ever wanted."[262] In truth, the founders had a "profound fear" of judicial discretion;[263] Chief Justice Hutchinson of Massachusetts declared that it tended to a "state of slavery." In their eyes judges were not makers of law, but discoverers of existing law, so that judicial innovation was "impermissible."[264] In a landmark case laying claim to judicial review, Judge Henry of the Virginia court stated:

> The judiciary, from the nature of the office . . . , could never be designed to determine upon the equity, necessity, or usefulness of law; that would amount to an

258. ELY, *supra* note 1, at 13.

259. *Id.* at 34.

260. S. ADAMS, WRITINGS 262 (1904). *See also* note 89 *supra*. Rufus King stated in the Massachusetts Ratification Convention that the Philadelphia Convention desired "to use those expressions that were most easy to be understood and least equivocal in their meaning . . . . We believe that the powers are closely defined, the expressions are as free from ambiguity as the Convention could form them." 3 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 268 (1911). *See also* the remarks of Caleb Strong, *id.* at 248. *And see also* note 246 *supra* (remarks of Madison).

261. ELY, *supra* note 1 at 225 n.47.

262. Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 411 (1978).

263. *See* note 241 *supra*. Ely remarks: "Proceeding on the basis of general rule rather than ad hoc determination also reduces the discretion of the decision-maker and thus helps to protect individuals and minority groups from invidious discrimination." ELY, *supra* note 1, at 155 n.*.

264. Horwitz, *The Emergence of an Instrumental Conception of American Law 1780–1820*, in 5 PERSPECTIVES IN AMERICAN LEGAL HISTORY 287, 296–98 (1971).

> express interfering with the legislative branch. . . . [N]ot being chosen immediately by the people, nor being accountable to them . . . , they do not, and ought not, to represent the people in framing or repealing any law.[265]

Henry reflected Montesquieu, the oracle of the founders: "The national judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or its rigor."[266] Judicial review was alien to English law—Parliament was supreme.[267] A few post-1776 state cases of which the Convention was aware sought to enforce constitutional limitations and aroused resentment leading to efforts to remove the offending judges.[268] Responding to the views of Gerry and others that judges were not especially qualified to judge of policy, the framers excluded them from participation in the presidential veto, that is, in the legislative process.[269] Little wonder that Hamilton, the great proponent of judicial review, assured the ratifiers that of the three departments, the judiciary "is next to nothing";[270] and he left no doubt that judicial power did not comprehend law-making or encroachment on the legislature.[271] Still less were judges considered constitution makers or revisers—that was left to the people by amendment under article V. It is therefore sheer fantasy to maintain that the founders employed "open-ended" terms in order to empower judges to overrule the legislature or rewrite the Constitution by invoking values derived outside the Constitution. Gary Leedes justly observes that Ely's theory tinkers "with the Constitution's allocation of powers."[272]

Ely's reiteration that the terms of the fourteenth amendment are "open-ended" is depressing, because he shuts his eyes to the proof to the contrary that was spread before him.[273] The "open-ended" theory was launched by Bickel as a tentative hypothesis: "what if any thought was given to the long range effect of the amendment in the future?" Could resort to the equal protection clause "have failed to leave the implication that the new

---

265. Kamper v. Hawkins, 3 Va. (1 Va. Cas.) 20, 47 (1793). An ardent activist, Professor Charles Black, observed that for the colonists "the function of the judge was thus placed in sharpest antithesis to that of the legislator," who alone was concerned "with what the law ought to be." C. BLACK, THE PEOPLE AND THE COURT 160 (1960).

266. C. MONTESQUIEU, COMMENTARIES ON THE LAW OF ENGLAND 130 (J. Prichard ed. 1878).

267. 1 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 91 (1765).

268. R. BERGER, CONGRESS V. THE SUPREME COURT 36–46 (1969).

269. Berger, *"The Supreme Court as a Legislature": a Dissent*, 64 CORNELL L. REV. 988 (1979).

270. THE FEDERALIST NO. 78 at 504 (A. Hamilton)(Mod. Lib. ed. 1937). *See also* note 245 *supra*.

271. There "is no liberty, if the power of judging be not separated from the legislative and executive powers," THE FEDERALIST NO. 78 at 504 (A. Hamilton)(Mod. Lib. ed. 1937); the courts may not "on the pretense of a repugnancy . . . substitute their own pleasure to the constitutional intentions of the legislature," *Id.* at 507. "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents . . . ." *Id.* at 510. And Hamilton assured the ratifiers that judges could be impeached for "deliberate usurpations of the authority of the legislature." *Id.*, NO. 81 at 526–27 (A. Hamilton).

272. Leedes, *The Supreme Court Mess*, 57 TEX. L. REV. 1361, 1435 (1979).

273. Berger, *Government by Judiciary: John Hart Ely's "Invitation,"* 54 IND. L.J. 277, 304–06 (1979). *See* R. BERGER, GOVERNMENT BY JUDICIARY 99–116 (1977). Perry, an activist much cited by Ely, wrote, "Berger's historical inquiry has, in my view, devastated the notion that the framers of the fourteenth amendment . . . intended it to be 'open-ended.'" Perry, *Book Review*, 78 COLUM. L. REV. 685, 695 (1978). *See also id.* at 691.

phrase . . . was more receptive to the 'latitudinarian' construction? No one made the point with regard to this particular clause."[274] Given that the introductory clause of the Bill was deleted in order to *obviate* a "latitudinarian" construction, that the framers stressed "equal protection" for the rights *enumerated* in the Civil Rights Act, that under the *pari materia* rule that meaning is to be given to "equal protection," particularly because Act and amendment were considered "identical,"[275] it stands customary analysis on its head to presume that "equal protection" was chosen because it was "receptive to the 'latitudinarian' construction," i.e. "inscrutable."

"It remains true," Bickel continued, "that an explicit provision going further than the Civil Rights Act would not have carried in the 39th Congress," that the Republicans drew back from a "formulation dangerously vulnerable to attacks pandering to the prejudice of the people," and therefore, he speculated, went "to the country with language which they could, where necessary, defend against damaging alarms raised by the opposition but which at the same time was sufficiently elastic to permit reasonable future advances."[276] To speak plainly, Bickel's hypothesis is that the Republicans concealed the future objectives they dared not avow lest the whole enterprise be imperilled. To my remark that this was "playing a trick upon an unsuspecting people," Ely replied, "[o]btaining ratification of open-ended language in the expectation that it will be given an open-ended interpretation is not playing a trick."[277] Senator Fessenden defined a trick as doing "something . . . which you cannot do if you made it plain to their [the people's] senses."[278] Concealment is implicit in Ely's own formulation: "The recognition that there was racism in society doubtless was one reason the framers chose open-ended language capable of development over time."[279] The "expectation" of an interpretation contrary to prevalent racism was not revealed to the ratifiers; to the contrary, the amendment was presented to the people as leaving suffrage in control of the states, without the slightest intimation that the words contained a "dark and abstruse" contrary meaning. Harry Flack, who searched the newspapers of the period, and who foreshadowed the Bickel theory, concluded that "had the people been informed of what was intended by the Amendment, they would have rejected it."[280] Of course there is not a shred of evidence of such a purpose; it is a figment of

274. Berger, *Government by Judiciary: John Hart Ely's "Invitation,"* 54 IND. L.J. 277, 304–05 (1979).

275. *See* text accompanying note 125 *supra*. Professor Willard Hurst wrote: "If the idea of a document of superior legal authority is to have meaning, terms . . . [to which the framers attach a clear meaning] must be held to that precise meaning." Hurst, *The Process of Constitutional Construction—The Role of History*, in SUPREME COURT AND SUPREME LAW 55, 57 (E. Cahn ed. 1954). *See also* the statement by Charles Sumner in note 184 *supra*.

276. Berger, *Government by Judiciary: John Hart Ely's "Invitation,"* 54 IND. L.J. 277, 305 (1979).

277. ELY, *supra* note 1, at 200 n.69.

278. Berger, *Goverment by Judiciary: John Hart Ely's "Invitation,"* 54 IND. L.J. 277, 306 (1979).

279. ELY, *supra* note 1, at 200 n.70.

280. H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 104–05 n.21, 237 (1908).

activist speculation. Nor can the people have ratified what was not disclosed.[281]

THE IMPOSSIBILITY OF A CLAUSE-BOUND INTERPRETATION

Ely's "impossible clause-bound interpretation" is a strawman, opposing an imaginary exclusive focus on "self-contained units" to construction, for example, of the ninth amendment "by exploring the nature of *the rest* of the document."[282] Only a tyro would insist that any one provision must be studied in isolation from the rest of the document. Interpretivists object, rather, to the judicial imposition of values drawn from *outside* the Constitution.[283] In fact, the rights of the sovereign people retained by the ninth amendment are unlimited and therefore defy comparison with those enumerated, let alone that it was not meant to enlarge federal powers. Resort to the "rest of the document" to explain the fourteenth amendment raises still other problems. The framers unmistakably recorded their determination to exclude suffrage from the amendment. Were antecedent provisions, contrary to the fact, to contradict that intention, they would have to yield to the later provision.

But let us follow Ely in his explorations and sample his far-fetched inferences. He opines that "[t]he Ex Post Facto and Bill of Attainder Clauses prove on analysis to be separation of power provisions, enjoining the legislature to act *prospectively* and by general rule (just as the judiciary is implicitly enjoined by Article III to act *retrospectively* and by specific decree)."[284] No separation of powers, but rather the patent injustice of condemning a man retroactively for an act that was innocent when performed, motivated opposition to ex post facto laws. Since such laws apply only to criminal and penal language, legislatures remain free to legislate retrospectively in civil, nonpenal cases.[285] So too the vice of bills of attainder was not that they were legislative adjudications but that they were legislative condemnations to death *without* trial,[286] whereas impeachment by Congress *after* trial was adopted. As Justice Samuel Chase summarized, bills of attainder and ex post facto laws had been products of "vindictive malice. To prevent such, and similar acts of

---

281. For citations, *see* R. BERGER, GOVERNMENT BY JUDICIARY 155 n.93 (1977).

282. ELY, *supra* note 1, at 12, 228 n.89 (emphasis added).

283. To appeal, for example, to the "cruel and unusual punishment" provisions as calling "for a reference to sources beyond the document itself," *id.* at 13, does little to illuminate our suffrage issue. Common law terms or institutions, such as "bill of attainder," "ex post facto," "trial by jury," necessarily require resort to the common law usage they expressed. We have no legislative history to indicate that the framers attached a special meaning to the "cruel and unusual" phrase, and so look to common law and contemporary practices. On the other hand, the framers unmistakably recorded their determination to exclude suffrage from the fourteenth amendment, and Ely would have us look "outside the document" to reverse that intention.

284. ELY, *supra* note 1, at 90 (emphasis added).

285. Berger, *Bills of Attainder: A Study of Amendment by the Court*, 63 CORNELL L. REV. 355, 365–67 (1978); Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380, 413 (1829): "There is nothing in the Constitution of the United States, which forbids the legislature of a State to exercise judicial functions."

286. Berger, *Bills of Attainder*, 63 CORNELL L. REV. 355, 356–57 (1978).

violence and injustice, I believe the Federal and State Legislatures were prohibited from passing any bill of atainder; or any ex post facto law."[287]

Ely's efforts to derive "equal protection" from earlier provisions of the Constitution are similarly flawed. He considers that the more "obvious" strategy to "protect the interests of minorities from the potentially destructive will of some majority coalition" was the "'list' strategy employed by the Bill of Rights, itemizing things that cannot be done to any one," though these "safeguards turn out to be mainly procedural."[288] What is obvious to Ely is hidden from one who reads Madison's explanation of the proposed Bill in the First Congress: "the great mass" of the opposition disliked the Constitution "because it did not contain . . . those safeguards which they have long been accustomed to have interposed between them and the magistrate . . . ."[289] And he said that "[t]he people of many States [not minorities in any State] have thought it necessary to raise barriers against power in all forms and departments of Government."[290] Ely notices that amendments five through eight are "instrumental provisions calculated to enhance the fairness and efficiency of the litigation process."[291] Any American, not merely a member of a minority, might find himself embroiled in litigation or the criminal process and wish to be protected by the traditional safeguards comprised in the "rights of an Englishman." It is no mean feat to translate provisions designed for the benefit of all into instruments for the special protection of minority interests.

Again, Ely says of the privileges or immunities clause of article IV, "An ethical ideal of equality is certainly working here, but the reason inequalities against nonresidents and not others were singled out for prohibition in the original document is obvious: nonresidents are a paradigmatically powerless class politically."[292] The progenitor clause in article IV of the Articles of Confederation explained that it was designed "[t]he better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union," to promote "trade and commerce."[293] This was a prime necessity if abrasive trade barriers between the thirteen independent state sovereignties were to be breached.[294] The intense state jealousy of federal power[295] would have repelled any suggestion of interference with state

287. Calder v. Bull, 3 U.S. (3 Dall.) 386, 389 (1798). *See* R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 27 (1973).

288. ELY, *supra* note 1, at 79–80.

289. 1 ANNALS OF CONGRESS 433 (Gales & Seaton eds. 1836) (print bearing running title "History of Congress").

290. *Id.* at 436.

291. ELY, *supra* note 1, at 95.

292. *Id.* at 83. *See also id.* at 90–91.

293. H. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 111 (7th ed. 1963).

294. For Madison's summary of reprehensible state practices, *see* 3 M. FARRAND, RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787 547–48 (1911).

295. For citations, *see* R. BERGER, CONGRESS V. THE SUPREME COURT 260–62 (1969). Referring to the Bill of Rights, the Supreme Court stated that, "so far from the States which insisted upon these amendments contemplating any restraint or limitation by them on their own powers; the very cause which gave rise to them, was a strong jealousy on their part of the power which they had granted in the Constitution." Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 587 (1840). *See* note 246 *supra* (statement by Madison).

political processes, whereas obstacles to free trade on a national scale were a drag on the Union. It is no accident that Ely cites no manifestation of concern in the Convention for the "politically powerless." To the contrary, Gouverneur Morris, advocate of the propertied minority, stated that "within the State itself a majority must rule, whatever may be the mischief done among themselves."[296]

In Ely's eyes, the fourth amendment can be seen as "another harbinger of the Equal Protection Clause, concerned with avoiding indefensible inequities in treatment," apparently because it called for a search warrant and the judgment of a "neutral and detached magistrate," thereby minimizing "arbitrariness and invidiousness in the making of such decisions" and "assuring the protection of minorities."[297] But the amendment applied to *all* searches, not merely searches of disparaged minorities; the entire American people wanted to be protected against warrantless searches by a remote and suspect newcomer, the national government.[298] In this they were united, not fragmented—the source of discrimination. Ely notices that Bingham, draftsman of the fourteenth amendment, initially "thought that an equal protection concept was part of the Fifth Amendment's Due Process Clause," but "came during the debates to recognize that his understanding was unusual" (a stunning understatement) and "added an Equal Protection Clause to the Due Process Clause."[299] What was not to be found in the "catch-all" due process clause is with even greater difficulty located in its specialized companion provisions. It would unduly burden these pages and weary the reader to examine Ely's other interpretations of the Bill of Rights. As Gordon Wood observed of the founders: "It was conceivable to protect the common liberties of the people against their rulers, but hardly against the people themselves."[300] Ely's approach to the Bill of Rights recalls the apocryphal editor

---

296. 2 M. FARRAND, RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787 439 (1911). James Wilson stated in the Convention that the "majority . . . would be no more governed by interest than the minority—it was surely better to let the latter be bound hand and foot than the former." *Id.* at 451. *See* text accompanying note 327 *infra*.

297. ELY, *supra* note 1, at 97, 172.

298. Compare the intense resentment aroused by the British writs of assistance (general warrants) in 1761. S. MORRISON, OXFORD HISTORY OF THE AMERICAN PEOPLE 183 (1965).

299. ELY, *supra* note 1, at 202 n.79.

300. G. WOOD, CREATION OF THE AMERICAN REPUBLIC 1776–1787 63 (1969). This was strikingly exemplified by the Massachusetts Body of Liberties of 1641: "No man's life shall be taken away . . . , no man's goods or estaite shall be taken away from him . . . unless it be by vertue or equities of some expresse law of the Country . . . established by a generall Court [Assembly] and sufficiently published." Hazeltine, *The Influence of Magna Carta on American Constitutional Development* in, MAGNA CARTA: COMMEMORATION ESSAYS 193 (H. Malden ed. 1917). Rodney Mott commented, "The wording indicated that it was intended that there should be no limitation upon the legislative power, and that it merely required that the law be published . . . ." R. MOTT, DUE PROCESS OF LAW 93–94 (1926). A Rhode Island law of 1647 similarly provided: "no person . . . shall be taken or imprisoned . . . but by the lawful judgment of his peers, or by some known law . . . ratified and confirmed by the major part of the General Assembly." THE EARLIEST ACTS AND LAWS OF THE COLONY OF RHODE ISLAND & PROVIDENCE PLANTATIONS 1647–1719 12 (J. Cushing ed. 1977). Speaking of the Bill of Rights, Chief Justice Marshall said: "Had Congress engaged in the extraordinary occupation of improving the constitutions of the several states by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language." Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833). *See also* note 156 *supra*.

of the New Masses who instructed a neophyte respecting a collision between a Cadillac and a Model-T Ford—"class angle it."

Minorities and Virtual Representation

Ely's zeal for minority "entitlements" leads him, as we have seen, to read "equality" into the most unlikely provisions, relying on far-fetched inferences for judicial power to fashion novel minority "rights." As he himself notes, "[T]he original Constitution was principally, indeed I would say overwhelmingly, dedicated to concerns of process and structure and not to the identification and preservation of specific substantive values."[301] Such individual rights as were enumerated in the 1787 Constitution dealt with security of property, commerce, and contracts. Broader individual rights are first met in the Bill of Rights, largely to safeguard established criminal procedures in prosecutions by the federal government, applicable to *all* of the people, not any particular minority. "The general strategy," Ely observes, has "not been to root in the document a set of substantive rights entitled to permanent protection."[302]

For long it was premised that the rights of minorities "protected by courts were established in the Constitution."[303] A perfervid apologist for an activist Court, Professor Paul Brest, candidly acknowledges that "[m]any of what we have come to regard as the irreducible minima of rights, are actually supraconstitutional; almost none of the others are entailed by the text or original understanding."[304] In other words, most minority "rights" are judge-made, without roots in the Constitution. Professor Robert Bork justly concludes that "not even a scintilla of evidence supports the argument that the framers and ratifiers of the various amendments intended the judiciary to develop new individual rights, which correspondingly create new disabilities for democratic government."[305] In fact, the records convincingly establish, for example, that the framers of the fourteenth amendment intended to exclude such crucial rights as suffrage and segregation. Apart from his "invitation" and "virtual representation" theories, Ely makes no pretense of justifying judicial creativity by constitutional grant; instead, once we "identify those groups in society to whose needs and wishes elected officials have no apparent interest in attending . . . it would not make sense to assign its enforce-

---

301. ELY, *supra* note 1, at 92. *See also id.* at 90; L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 3 (1972).

302. ELY, *supra* note 1, at 100.

303. Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1173 (1977).

304. Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 236 (1980). "We are repeatedly told by the courts that the current egalitarianism which they are helping to impose derives from the Constitution. That, I think, is arrant nonsense. It is not being taken from the Constitution, it is being put into it." Kurland, *Ruminations on the Quality of Equality*, 1979 B.Y.U.L. REV. 7, 8. "It is not the province of this court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973). *See* note 156 *supra* (statement of Justice Miller).

305. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695, 697.

ment to anyone but the courts."[306] This is an argument of expedience, not of constitutional authorization. The founders, however, did not share Ely's concerns; for them "individual rights, even the basic civil liberties that we consider so crucial, possessed little of their modern theoretical relevance when set against the will of the people."[307] Like Elbridge Gerry, they relied "on the Representatives of the people [not the courts] as the guardians of their Rights and Interests."[308]

Ely is aware that "rule in accord with the consent of a majority of those governed is the core of the American governmental system," that "[o]ur constitutional development over the past century has . . . substantially strengthened the original commitment to control by a majority of the governed."[309] He observes that in part the Civil War was "about whether a national majority could control the conduct of a group that in national terms constituted a minority," and that it demonstrated "the strength of the majority's resolve that this nation remain controllable by majority will,"[310] even though it involved a gigantic expropriation. When the North struck the shackles of slavery from the blacks, it did not clothe them with all of the rights the majority enjoyed; it unmistakably excluded suffrage and segregation from the fourteenth amendment and proscribed discrimination only with respect to such rights as were essential to the very existence of the freedmen.[311] Charles Sumner averred that if the fourteenth amendment is "inadequate to protect persons in . . . their right to vote, it is inadequate to protect them in anything."[312]

To this Ely opposes his theory of "virtual representation"—elected officials must "represent" minorities; he maintains that the founders envisioned a "republic" in which "the representatives would govern in the interest of the whole people."[313] In the Revolutionary period, however, there was great "confusion about representation present in American thinking"; there was, said Gordon Wood, a "growing sense that the representative was merely a limited agent or spokesman for the local interests of his constituents in the decade after Independence . . . , [which] destroyed the traditional character of representation,"[314] i.e. the English "virtual representation," a term

306. ELY, *supra* note 1, at 151. Professor Joseph W. Bishop, Jr. wrote of liberals that "they obviously have no faith whatever in the wisdom or will of the great majority of the people, who are opposed to them. They are doing everything possible to have those problems resolved by a small minority in the courts . . . ." Bishop, *What is a Liberal—Who is a Conservative*, 62 COMMENTARY 47 (1976).

307. G. WOOD, CREATION OF THE AMERICAN REPUBLIC 1776–1787 63 (1969).

308. 2 M. FARRAND, RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787 75 (1911).

309. ELY, *supra* note 1, at 7.

310. *Id.* at 187–88 n.24.

311. As William Lawrence declared, "It is a mockery to say that a citizen may have a right to live, and yet deny him the right to make a contract to secure the privilege and the rewards of labor." CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866).

312. CONG. GLOBE, 40th Cong., 3d Sess. 1008 (1869).

313. ELY, *supra* note 1, at 79.

314. G. WOOD, CREATION OF THE AMERICAN REPUBLIC 1776–1787 173, 185, 387 (1969).

that, as Ely notes, "was anathema to our forefathers."[315] So far as my reading goes, if the framers departed from that view they left no trace in the Convention records. To the contrary, Gouverneur Morris said that "within the State itself, a majority must rule, whatever may be the mischief among themselves."[316] Correction of majority excesses against the propertied minority, Madison explained, generated such express safeguards as the contracts clause and prohibition of paper emission, believing that under the constitutional division of "the powers of Government [state and federal] . . . unjust majorities would be formed with still more difficulty, and be therefore the less to be dreaded . . . ."[317] Quite different safeguards were contemplated for "representation."

Federalist No. 57 explained that the House would be restrained from "oppressive measures" because "they can make no law which will not have full operation on themselves . . . as well as on the great mass of the society. . . . If it be asked, what is to restrain the House of Representatives from making legal discriminations in favor of themselves and a particular class of the society? I answer: the genius of the whole system" and similar factors,[318] from which judicial interposition was notably absent, it being Madison's view that courts enforce "express provisions." In addition, Ely notes the "Constitution's more pervasive strategy . . . of pluralism," i.e. "although at a local level one 'faction' might well have sufficient clout to be able to tyrannize others [ruling out virtual representation at the local level], in the national government no faction or interest group would constitute a majority capable of exercising control."[319] There was a feeling, Ely comments, that "'the people' were an essentially homogeneous group whose interests did not vary

315. ELY, *supra* note 1, at 82. Ely finds that "'virtual representation'" nevertheless influenced the article IV safeguard for the "politically powerless." *Id.* at 83. *But see* text accompanying notes 292–96 *supra*.

316. 2 M. FARRAND, RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787 439 (1911). Madison said in FEDERALIST NO. 10 at 57 (Mod. Lib. ed. 1937): "If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society, but it will be unable to execute and mask its violence under the forms of the Constitution." In this connection, it is noteworthy that the founders accepted malapportionment. Nathaniel Gorham said in the Convention: "[T]he Constitution of Massachusetts had provided that the [representation of the] larger districts should not be in an exact ratio to their numbers. And experience he thought had shewn the provision to be expedient." 1 M. FARRAND, RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787 405 (1911). Michael Stone stated in the First Congress that "the representatives of the States were chosen by the States in the manner they pleased." 1 ANNALS OF CONGRESS 769 (Gales & Seaton eds. 1836) (print bearing running title "History of Congress"). James Wilson took account of the disparate State exclusions from suffrage. For details and citations *see* R. BERGER, GOVERNMENT BY JUDICIARY 89 (1977). In 1853, Charles Sumner defended the disproportionate Massachusetts representation. *Id.* at 73–74. James Blaine recognized it in 1866. *Id. See also* statements of Ben Butler, *id.* at 74. *And see also* note 221 *supra*, and note 296 *supra* (statement of Wilson).

317. 4 M. FARRAND, RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787 86–87 (1911).

318. THE FEDERALIST NO. 57 at 373 (J. Madison)(Mod. Lib. ed. 1937). To curb the willfulness of factious majorities, Madison relied on passing their views "through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations." FEDERALIST NO. 10 at 59 (Mod. Lib. ed. 1937). Whether "representation" of minorities was adequate was thus left to the "wisdom" of the representative body itself, not to a supervisory court. *Cf.* note 300 *supra*.

319. ELY, *supra* note 1, at 80.

significantly."[320] But by the time "the republic approached its fiftieth birthday" that view had run its course. "Simultaneously," Ely remarks, "we came to recognize that the existing constitutional devices for protecting minorities were simply not sufficient,"[321] that the "existing theory of representation had to be extended" so that a representative "would not sever a majority coalition's interests from those of various minorities."[322] Thus, Ely confesses that an "extension" was required to correct the absence of existing constitutional protection. That cannot, however, be supplied by theorizing nor by judicial decree, but as Madison indicated in another context, the want requires an amendment.[323] Then too, although the framers and ratifiers of the fourteenth amendment narrowly limited the privileges conferred on the freedmen, on Ely's reasoning the electors nevertheless were bound thereafter to confer upon them whatever privileges the white "majority" conferred upon themselves. "Virtual representation" is thus merely another device for nullifying the will of the framers and ratifiers.

In truth, Ely, while paying lip service to majority rule,[324] would sap it. What matters it that, as Madison stated, "the majority in each State must bind the minority,"[325] if a majority victory at the polls burdens it with defeated minority claims. Elected officials represent those who elected them[326] and are not bound to carry out the desires of the losers. Ely would have the tail wag the dog. In Hamilton's words, "To give a minority a negative upon the majority . . . is, in its tendency, to subject the sense of the greatest number to that of the lesser."[327] No verbal gymnastics can disguise that effect. Ely recognizes the contradiction:

> It will not do simply to say "the majority rules but the majority does not rule." The problem for a noninterpretivist approach has been convincingly to distinguish itself from just this sort of bald contradiction. There have been attempts to do so . . . but they have generally been halting and apologetic . . . .[328]

His own reconciliation of the "contradiction" is by way of an "heroic inference"—"open-minded" provisions constitute an "invitation" to judicial enactment of an "unwritten Constitution," reinforced by his "virtual repre-

---

320. *Id.* at 79.

321. *Id.* at 81.

322. *Id.* at 82.

323. Madison stated, "Had the power of making treaties, for example, been omitted, however necessary it might have been, the defect could only have been lamented, or supplied by an amendment to the Constitution." 2 ANNALS OF CONGRESS 1900–01 (1791).

324. Ely reminds us that "most Americans would reject many provisions of the Bill of Rights," ELY, *supra* note 1, at 189 n.2, intimating that Big Brother knows best. Should the people by amendment decide to supersede one or the other of its provisions, I would say with Justice Holmes, "whether I like it or not, 'God' dammit, let 'em do it." C. CURTIS, LIONS UNDER THE THRONE 281 (1947).

325. THE FEDERALIST NO. 39 at 247 (J. Madison)(Mod. Lib. ed. 1937). *See* text accompanying note 316 *supra*.

326. *See* text accompanying note 314 *supra*. *See also* ELY, *supra* note 1, at 129.

327. THE FEDERALIST NO. 22 at 135 (A. Hamilton)(Mod. Lib. ed. 1937). *See* note 296 *supra* (statement of Wilson).

328. ELY, *supra* note 1, at 8.

sentation" theory, illustrating once more how commitment to a cause warps judgment.[329]

Ely deludes himself in thinking he has succeeded where others have failed. Already he is rejected by fellow academicians. So Bork considers Ely's "[r]epresentation-reinforcement could take us back to *Lochner*";[330] Mark Tushnet observes that it "necessarily involves judicial displacement of citizens' choices between political and other kinds of activity, in the name of the objective value of political participation."[331] Such accounts, as Ely's Harvard colleague Lawrence Tribe remarks, permit courts to "portray themselves as servants of democracy even as they strike down the actions of supposedly democratic governments."[332] For my part, Paul Brest's frank avowal is to be preferred: judges are not bound by the Constitution.[333] That brings the legitimacy of judicial activism into the open, and frames the issue in a way the people can understand, and, understanding, can be counted on to take appropriate action.

---

329. Ely is aware that "prejudice is a lens that distorts reality," *id.* at 153, but apparently is unaware that the "process of finding 'good' reasons to justify our routine beliefs—is known to modern psychologists as 'rationalizing.' . . . Our 'good' reasons ordinarily . . . are at bottom the result of personal preference or prejudice, and not of an honest desire to seek or accept new knowledge." J. ROBINSON, THE MIND IN THE MAKING 44 (1921).

330. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695, 700.

331. Tushnet, *Darkness at the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1038 (1980).

332. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

333. Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 224 (1980). For comment, *see* Berger, *Paul Brest's Brief for an Imperial Judiciary*, ___ MD. L. REV. ___ (1980). For similar claims, *see* Miller, *Do the Founding Fathers Know Best?*, Wash. Post, Nov. 13, 1977, § E at 8, col. 2; Cover, *Book Review*, NEW REPUBLIC 26 (Jan. 14, 1978); Forrester, *Are We Ready for Truth in Judging?*, 63 A.B.A.J. 1212, 1215 (1977); White, *Reflections on the Role of the Supreme Court: The Contemporary Debate and the "Lessons" of History*, 63 JUDICATURE 162 (1979).